(29,712)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 402

ALPHA PORTLAND CEMENT COMPANY, PLAINTIFF IN ERROR,

vs.

COMMONWEALTH OF MASSACHUSETTS

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS

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[fol. 1] COMMONWEALTH OF MASSACHUSETTS:

CHIEF JUSTICE'S CERTIFICATE

I, Arthur P. Rugg, Chief Justice of the Supreme Judicial Court of the Comonwealth of Massachusetts, do certify that John F. Cronin, Esquire, whose signature is affixed to the paper hereto annexed, is Clerk of said Court, holden at Boston, in and for the County of Suffolk, in said Commonwealth, and hath the keeping of all the ancient files, records, and proceedings of said Court throughout the Commonwealth, down to the first day of August A. D. 1797, as well as of the files, records, and proceedings of said Court holden as aforesaid, for said County of Suffolk, subsequent to that time; and is, by law, the proper person to make out and to certify copies of all the records and proceedings of the said Supreme Judicial Court previous to the said first day of August A. D. 1797, we well as of all records and proceedings of the said Court, holden as aforesaid, for the said County of Suffolk, subsequent to that time; and that full faith and credit is and ought to be given to his acts and attestations, done as aforesaid, and that his attestation to the paper hereunto annexed is in due form.

In testimony whereof, I have hereunto set my hand, and caused the seal of said Court to be hereunto affixed, this twelfth day of June, in the year one thousand nine hundred and twenty-three.

Arthur P. Rugg. (Seal.)

[fol. 2] WRIT OF ERROR—Filed June 7, 1923

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Justices of the Supreme Judicial Court of the Commonwealth of Massachusetts, holden at Boston, within and for the county of Suffolk, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Judicial Court before you, or some of you, being the highest court of law or equity of the Commonwealth of Massachusetts in which a decision could be had in the said suit between Alpha Portland Cement Company, a corporation duly organized and existing under the laws of the State of New Jersey, Plaintiff and Commonwealth of Massachusetts, Defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or com-

mission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened, to the great damage of the said Alpha Portland Cement Company, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable William H. Taft, Chief Justice of the United States, the fifth day of June in the year of our Lord one thousand nine hundred and twenty-three.

James S. Allen, Clerk of the District Court of the United States, District of Massachusetts.

Allowed by: Arthur P. Rugg, Chief Justice of the Supreme Judicial Court of Massachusetts.

[fol. 3] COMMONWEALTH OF MASSACHUSETTS, ss:

And now, here, the Judges of the Supreme Judicial Court make return of this writ by annexing hereto and sending herewith, under the seal of the said Supreme Judicial Court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof, I, John F. Cronin, Clerk of said Supreme Judicial Court, have hereto set my hand and the seal of said court this twelfth day of June, A. D. 1923.

John F. Cronin, Clerk.

[File endorsement omitted.]

[fol. 4] COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

To all persons to whom these presents shall come, Greeting:

Know Ye,

That among our Records of our Supreme Judicial Court, sitting at Boston in said County of Suffolk, for the hearing of cases in Equity from the first day of January in the year of our Lord one thousand nine hundred and twenty-one to the eight day of June Nineteen hundred and twenty-three, both days inclusive, it is thus contained: the following being the entire record in the case:

[fol. 5] COMMONWEALTH OF MASSACHUSETTS,
Suffolk County:

Supreme Judicial Court

In Equity

ALPHA PORTLAND CEMENT COMPANY, Petitioner,

v.

THE COMMONWEALTH OF MASSACHUSETTS

RESERVATION

This case is a petition brought under G. L. c. 63, sec. 77, for the recovery of taxes for the year 1921, assessed to the petitioner under the provisions of G. L. c. 63, and St. 1921, c. 361 and 493, and Acts in amendment thereof and in addition thereto, in the sum of $800.45, and claimed to have been illegally exacted. This case came on to be heard before me upon the petition, the respondent's answer, and an agreed statement of facts. Upon the request of the parties I reserve the case for the consideration and determination of the Full Court.

August 22, 1922.

John C. Crosby, J. S. J. C.

IN THE SUPREME JUDICIAL COURT

PETITION

To the Honorable the Justices of the Supreme Judicial Court of Massachusetts sitting in equity within and for the County of Suffolk:

Respectfully represents your petitioner, Alpha Portland Cement Company, as follows:

1. Your petitioner is a foreign corporation organized and existing under and by virtue of the laws of the State of New Jersey, and [fol. 6] is and was at all the times hereafter mentioned engaged extensively in interstate commerce throughout the United States and maintains in the City of Boston, County of Suffolk in the Commonwealth of Massachusetts, a sales office used exclusively for conducting interstate commerce and for no other purpose.

2. The activities of your petitioner within the Commonwealth of Massachusetts are exclusively confined to the solicitation by salesmen engaged by petitioner of orders from customers resident therein and neighboring states, and the transmission of the said orders by mail to the home office of your petitioner located in the city of Easton in the Commonwealth of Pennsylvania, where the said orders are accepted or rejected. Your petitioner entered the Commonwealth of

Massachusetts for the purpose of transacting interstate commerce, and has always strictly confined its operations within the said Commonwealth of Massachusetts to the solicitation of orders as aforesaid and to the execution of said orders when they have been accepted, which acceptance takes place outside of the Commonwealth of Massachusetts as aforesaid, and the shipment of merchandise called for thereby from other states where the good sold are manufactured, produced, or stored by your petitioner into the Commonwealth of Massachusetts or neighboring states, where the purchaser resides, the said point of delivery in every case, however, being different from the state where such transportation begins.

3. The business of your petitioner consists of the manufacture and sale of cement. The sales office maintained by your petitioner within the Commonwealth of Massachusetts is in charge of a district sales manager, who himself solicits orders at the places of business of prospective customers, the only other employee in the said office being a clerk. In addition to the district sales manager, your petitioner employs three salesmen, who solicit orders in the Commonwealth of Massachusetts, and in other states of New England, for cement packed in sacks, bags, or barrels. The orders taken by said salesmen are turned in at the said sales office and forwarded to the home office of your petitioner at Easton, Pennsylvania, where they are accepted or rejected. If the said orders are accepted, the merchandise is shipped from the company's mills, located at Martin's Creek, Pennsylvania, or Alsen, New York, direct to the consumer. Invoices for merchandise so shipped are sent from the principal office at Easton, Pennsylvania, direct to the consumer, and contain a direction that funds in payment therefor be sent direct to your petitioner's home office at Easton, Pennsylvania. In substantially all [fol. 7] cases funds in payment of said merchandise are sent directly by the customer to the said home office of your petitioner at Easton, Pennsylvania. Your petitioner keeps no merchandise in its said sales office located in the city of Boston, or anywhere in Massachusetts, in sample form or otherwise. Your petitioner keeps no bank account in Massachusetts, the office rent and salesmen's salaries being paid direct from your petitioner's home office at Easton, Pennsylvania. Incidental expenses are paid from an impress account of not exceeding $1,000, kept by your petitioner's district sales manager in his own name. Your petitioner keeps no books of record in Massachusetts, nor is any of your petitioner's property located in Massachusetts, other than a few hundred dollars' worth of office furniture located in the aforesaid office. Your petitioner ships no merchandise from one point in Massachusetts to another point in that state, nor from the Commonwealth of Massachusetts to any other state or country. None of your petitioner's stockholders' or directors' meetings are held in Massachusetts, and no officer or agent of your petitioner has any office in Massachusetts, except the district sales manager mentioned.

4. Your petitioner has on several occasions advised the Department of Corporations and Taxation of the Commonwealth of Massa-

chusetts of the details of its activities carried on within the said Commonwealth of Massachusetts, and has steadfastly and repeatedly claimed that its said activities were purely interstate in character, and that your petitioner could not legally be required to pay any excise or tax to the Commonwealth of Massachusetts. Notwithstanding such information so supplied to the said Department of Corporations and Taxation and your petitioner's contention in respect thereto, the Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts, on the 17th day of May, 1921, by letter dated that day, informed your petitioner that he had decided that your petitioner was subject to the excise tax law of the Commonwealth of Massachusetts, and demanded, by notice bearing the same date, that your petitioner prepare and file a proper return as provided by the Foreign Corporations Excise Tax Act of the Commonwealth of Massachusetts, and that the said return be filed within twenty days from the date of the said notice, and that upon your petitioner's failure to do so severe penalties would be assessed against it. That in compliance with the said demand, and not as its voluntary act, your petitioner, on the 21st day of June, 1921, made and delivered under protest to the Department of Corporations and Taxation of the Commonwealth of Massachusetts, a report in writing for [fol. 8] the year 1921 in the form prescribed by the said Commissioner of Corporations and Taxation, for the purpose of supplying the said Commissioner with the information demanded by him for the purpose of assessing the excise tax claimed by the said Commissioner to be due under the provisions of chapter 63 of the General Laws. A copy of the said return is hereunto annexed and marked Exhibit "A."

5. That thereafter and on or about the 7th day of July, 1921, the said Department of Corporations and Taxation of the Commonwealth of Massachusetts notified your petitioner, by notice dated that day, that it was the intention of the Commissioner of Corporations and Taxation of said Commonwealth of Massachusetts to assess a tax against your petitioner upon net income in excess of that shown in your petitioner's report for the said year, 1921, for reasons in said notice stated. Your petitioner, in response to said notice and on the 14th day of July, 1921, again protested against any tax being assessed against it, on the ground that it was not doing business in the Commonwealth of Massachusetts and that its activities within that Commonwealth, as explained in the statement annexed to its return for the year 1921, constituted interstate commerce, and that any tax assessed against it would be illegal and void and in contravention of the commerce clause and other clauses of the Federal Constitution; and your petitioner further protested against a tax being assessed against it upon the net income as found by said Commissioner and as shown in the said notice. The said notice of the Department of Corporations and Taxation and your petitioner's response thereto are hereunto annexed and marked respectively Exhibits "B" and "C."

6. That thereafter, and on or about the 20th day of September, 1921, the said Department of Corporations and Taxation of the Commonwealth of Massachusetts made and settled an account against your petitioner for taxes based upon the net income as found by the Commissioner and claimed to be due from your petitioner for the year 1921 under the provisions of chapter 63 of the General Laws and Acts in amendment thereof and in addition thereto, and in accordance with chapters 361 and 493 of the Acts of 1921 for the sum of $800.45, and rendered such account and notice thereof to your petitioner; a copy of said account is hereto annexed and marked Exhibits "D" and "E."

7. Thereafter, and on or about the 19th day of October, 1921, your petitioner paid the said sum of $800.45 to the Commonwealth of Massachusetts and received a receipt for the same, which receipt is in the form of a stamp appearing on the original bills, copies of [fol. 9] which are hereto annexed and marked Exhibits "D" and "E." Your petitioner made the said payment under protest, and a letter of protest dated the 17th day of October, 1921, accompanied such payment; a copy of such protest is hereto annexed and marked Exhibit "F."

8. The said tax assessed against your petitioner and paid under protest is illegal and void for the following reasons:

(a) The imposition of the said tax against your petitioner is in violation of the Constitution of the United States in that your petitioner is denied the rights and privileges assured to it therein and in that the said tax so assessed against your petitioner is a direct burden on interstate commerce and constitutes an unlawful regulation of interstate commerce in contravention of the commerce clause embodied in section 8 of article I of the Constitution of the United States.

(b) That the said tax so assessed against your petitioner by the Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts is in violation of the Federal Constitution in that it levies a tax upon property of your petitioner situated without the limits of the Commonwealth of Massachusetts, thereby depriving your petitioner of its property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States.

(c) Your petitioner draws in question the validity of said chapter 63 of the General Laws and chapters 361 and 493 of the Acts of 1921 and Acts in amendment thereof, on the ground that said statutes are repugnant to the Constitution of the United States in that they levy a tax which is a direct burden on interstate commerce and constitutes an unlawful regulation of interstate commerce in contravention of the commerce clause embodied in section 8 of article I of the Constitution of the United States.

(d) Your petitioner draws in question the validity of said chapter 63 of the General Laws and chapters 361 and 493 of the Acts of 1921 and Acts in amendment thereof, on the ground that said statutes are repugnant to the Constitution of the United States in that they levy a tax against property of your petitioner situated without the limits of the Commonwealth of Massachusetts, thereby depriving your petitioner of its property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States.

[fol. 10] 9. Wherefore your petitioner brings this petition against the Commonwealth of Massachusetts, the respondent herein, pursuant to the provisions of section 77 of chapter 63 of the General Laws, and prays that the aforesaid tax, amounting to $800.45, paid to the Commonwealth of Massachusetts by your petitioner, may be adjudged to have been illegally assessed, and that the amount thereof may be returned to your petitioner by said Commonwealth of Massachusetts with interest from the date of payment, and for such other and further relief as to this Court may seem just.

Dated November 21, 1921.

Alpha Portland Cement Company, Petitioner. By Jno. J. Matthes, Treasurer. [Seal.] Warner, Stackpole & Bradlee, Solicitors. Porter & Taylor, Counsel. 30 Broad Street, New York City.

County of Northampton,
State of Pennsylvania, ss:

John J. Matthes, being duly sworn, deposes and says that he is the treasurer of the petitioner herein: that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true. That the reason why this verification is not made by petitioner is that petitioner is a corporation and deponent is an officer thereof, to wit, the treasurer.

Jno. J. Matthes.

Sworn to before me this 21st day of November, 1921. John G. Taylor, Notary Public, Easton, Pa. Commission expires January 17, 1925. [Seal.]

[fol. 11] State of Pennsylvania,
County of Northampton, ss:

I, Thomas A. L. Hay, Prothonotary of said County, and Clerk of the Court of Common Pleas, in and for said County, do hereby certify, that the said Court is a Court of Record. That John G. Taylor, Esq., whose name is subscribed to the certificate or proof of acknowledgment of the annexed instrument, was at the time of taking the

same a notary public in and for said County and a resident of said County, duly commissioned and sworn, and qualified to act as such; that as such notary public he was at the time of taking such acknowledgment duly authorized by the laws of the State of Pennsylvania to take acknowledgments and proofs of deeds or conveyances for lands, tenements or hereditaments in the State of Pennsylvania, that I am well acquainted with the handwriting of said notary public and verily believe that his signature to the same is genuine. That his commission is dated Jan. 17, 1921, and will expire Jan. 17, 1925.

In testimony whereof, I have hereunto set my hand and affixed the seal of said office, at Easton, this 21st day of November, A. D. 1921.
Thomas A. L. Hay, Prothonotary. [Seal.] Filed November 30, 1921.

(Here follows Exhibit "A" to Petition, marked side folio pages 12, 13, 14, and 15.)

[fol. 16] The annexed report on Form 355 (b) and the schedules annexed thereto for the year 1921 are filed by the Alpha Portland Cement Company under compulsion and under protest and only for the purpose of avoiding the imposition of the penalties provided by the statutes of Massachusetts and in conformity with the demand of the Department of Corporations and Taxation of the Commonwealth of Massachusetts contained in said Department's two letters dated May 17, 1921, one of which is addressed to Louis H. Porter and the other to the Alpha Portland Cement Company. While the report is prepared in conformity with the said ruling of the said Department of the Commonwealth of Massachusetts, the Alpha Portland Cement Company respectfully insists that the decision of the said Department requiring the filing of this return is erroneous and said corporation specifically stipulates that the filing of this return shall not be considered a waiver or abandonment of its rights to contest the validity of the said Departmental ruling and of any tax or fee that may be assessed against the said corporation. The said Alpha Portland Cement Company contends that the Commonwealth of Massachusetts is without power or jurisdiction to assess a tax against it for the reason that the business of the corporation is purely interstate in its character and comes within the protection of the Commerce Clause and other clauses of the Federal Constitution, as the following statement of fact shows:

The Alpha Portland Cement Company is incorporated under the laws of New Jersey for the purpose of manufacturing and selling cement. Its home office is located at Easton, Pennsylvania. The corporation leases in Boston, Massachusetts, an office located at Rooms 619-620, Board of Trade Building, situated at State, Broad, Central and India Streets in said City, which is the only office of the company in Massachusetts. The said office is in charge of a dis-

✓ EXHIBIT "A" for Petition

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THE COMMONWEALTH OF MASSACHUSETTS

Form 355B

1921 FOREIGN BUSINESS CORPORATION EXCISE TAX RETURN

No.

(GENERAL LAWS, CHAPTER 63.)

To be filed within the first ten days of April, 1921, with the Commissioner of Corporations and Taxation, Division of Corporations, State House, Boston.

ISSUED	ASSESSED
VERIFIED	ASSESSED BY

DO NOT WRITE ABOVE THIS LINE

READ INSTRUCTION SHEET

Returned of ALPHA PORTLAND CEMENT COMPANY Manufacture & Sale Portland Cement
(Name of corporation) (Kind of business, Quality to detail)

Post office address Easton, Pa.

Location of principal office First National Bank Bldg., Easton, Penna.
(No. and street, number) (City or Town) (State)

Name of Treasurer Jno. J. Matthews Location of Massachusetts office Board of Trade Bldg., Boston
(Street and street number) (City or Town)

Return of Income for the {Calendar / Fiscal} year ending December 31, 19 20

SCHEDULE A. TAXABLE NET INCOME BEFORE DEDUCTING EXCESS PROFITS REVENUE FOR PERIOD OF ASSESSMENT 1920

GROSS INCOME										
1. Gross sales, less returns and allowances	$ 8	746	230	68						
2. Less cost of goods sold, exclusive of expenses, interest, and other items called for separately below	4	373	899	70	$ 4	372	330	98		
3. Gross income from operations other than trading or manufacturing, less allowances								0		
4. Taxable interest on obligations of the United States and War Finance Corporation Bonds						99	076	33		
5. Taxable interest from all other sources						10	441	89		
6. Rentals								0		
7. Royalties								0		
8. Share of net income earned by personal service corporation during its current taxable period (whether received or not)								0		
9. Dividends on stock of (a) foreign corporations, $; (b) domestic corporations, except personal service corporations from earnings accumulated on or after January 1, 1918, $; total								0		
10. Gross income from all other sources (not including any amount reported in Item 22, below)								0		
11. TOTAL OF ITEMS 1 TO 10									$ 4	481 868 54
DEDUCTIONS										
12. Ordinary and necessary expenses (except amounts reported in Item 8 above or called for separately below)	$ 1	819	489	07						
13. Compensation of officers (including salaries, commissions, and other compensation in whatever form paid)			187	028	43					
14. Repairs (including labor, supplies, etc.)	1	188	082	86						
15. Interest				260	88					
16. Taxes			74	298	21					
17. Debts ascertained to be worthless and charged off within the taxable period			2	804	92					
18. Bad debts, wear and tear (including obsolescence)			263	898	92					
19. Depletion			1	191	12					
20. TOTAL OF ITEMS 12 TO 19									$ 3	815 770 51
21. DEDUCTIONS BETWEEN ITEMS 11 AND 20									1	866 098 03
22. Profit or loss on sales of capital assets and miscellaneous investments, including Liberty bond dividends	$		18	980	00					
23. Losses sustained during the taxable period and not compensated for by insurance or otherwise (attach to last column adjustment of Items 22 and 23)					0				$	18 980 00
24. Net income for taxable period exclusive of deductions for dividends and amortization (total of or difference between Items 21 and 23, the latter as extended)									$ 1	847 118 03
25. Dividends on stock of (a) foreign corporations taxable by the United States on their net incomes, and (b) domestic corporations, except personal service corporations from earnings accumulated on and after January 1, 1918	$				0					
26. Amortization of war facilities (actual total of Items 24 and 25)					0					
27. NET INCOME FOR TAXABLE PERIOD (Difference between Items 24 and 26, the latter as extended)									$ 1	847 118 03

SCHEDULE B. VERIFICATION OR CORRECTION OF SCHEDULE A

(a) Have filing the Federal Return have any errors or inaccuracies in Items 1 to 27 inclusive been discovered? Ans. None

(b) If so, state in detail upon a memorandum hereto annexed what corrections should be made.

(c) Has the Corporation received notice that the assessment made by the Federal Government is based upon a net income greater or less than is reported in Schedule A? Ans. No

(d) If so, state upon a memorandum hereto annexed the amount of net income as computed by the Federal Government upon the latest determination by it of the proper tax, setting forth the facts giving rise to the difference.

Has the corporation received notification of any change in the amount of net income as determined by the Federal Government with respect to any previous year, return of which was required to be made under the laws of this Commonwealth? Ans. No

If so, state for what year or years

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SCHEDULE C. CORPORATE EXCESS

TABLE I — CAPITAL STOCK

	Amount authorized	Amount issued and outstanding Apr. 1, 1921	Amount held in treasury Apr. 1, 1921 (or Investment Stock)	Number of Shares issued Apr. 1, 1921	Par Value per Share	Market Value on
Common	23,000,000	15,799,100.		157,991.	100.00	Not known
1st Pref.	2,000,000	2,000,000		20,000	100.00	" "
2nd Pref.						

If stock is listed on Stock Exchange give name of Exchange Not listed

If stock is not listed on Stock Exchange, state last four sales, giving the information called for in Table II. Do not include "wash" sales.

TABLE II — SALES OF STOCK

	Date of Sale	Number of Shares	Price per Share	Power or Private Sale		Date of Sale	Number of Shares	Price per Share	Power or Private Sale
Com.	All transfers of Alpha stock transactions between individual stockholders, consideration not known.				1st Pref.				
Com.					1st Pref.				
Com.					2nd Pref.				
Com.					2nd Pref.				
1st Pref.					2nd Pref.				
1st Pref.					2nd Pref.				

TABLE III — NET EARNINGS — LAST FIVE YEARS

Year ended —	Net Income (Deficit in red)	Dividends	Assessments	Net Earnings (After Taxes)	Number of Shares	Dividends declared		
						Common	First Preferred	Second Preferred
1916	$	$	$	$ 510,514.31	100,000	2%	7%	%
1917				470,249.53	100,000	3%	7%	%
1918				385,305.42	100,000	3%	7%	%
19.19				938,168.76	100,000	3%	7%	%
19.20				961,686.04	100,000	6%	7%	%
Total				3265,923.07		17%	35%	
Average	$	xxxxxx	xxxxxx	$ 653,184.61		3 2/5%	7%	%

TABLE IV — ASSETS AND LIABILITIES — APRIL 1, 1921

	Assets — Books of Account	Assets — Fair cash Value	Liabilities (actual)	
Real estate	$ 1,267,438.32	$	Capital stock	$ 17,799,100.00
Machinery	7,664,902.89		Mortgages	216,500.00
Furniture, fixtures and tools	12,000.00		Notes payable	0
Autos, trucks and teams	36,208.70		Accounts payable	812,641.95
Merchandise	3,918,076.15		Other liabilities (standing items)	
Notes	31,144.68		Wages	89,505.19
Accounts receivable	621,168.69		Reserves	1,012,445.88
Securities	6,053,616.83		Profit & Loss	1,146,089.91
Cash	121,726.54			
Good Will				
Other assets (standing items)	1,750,000.00			
Total assets	$ 21,076,282.74	$	Total liabilities	$ 21,076,282.74

State any other facts that are material in determining the fair cash value of the shares.....

SCHEDULE C.—Continued

TABLE A — ASSETS EMPLOYED IN BUSINESS WITHIN MASSACHUSETTS (See Instruction Sheet)

	Values April 1, 1922
Real estate	$ None
Machinery	None
Merchandise	None
Other tangible property (office furniture only)	573.00
Portion of bank deposits in this and in other states employed in conduct of business within Massachusetts*	None
Portion of accounts receivable*	None
Portion of patents* $ ..... Portion of good will* $ ..... Total	None
Portion of all other intangible assets employed in Massachusetts (itemize):*	None
Total of assets employed in business within Massachusetts	$ 573.00

TANGIBLE ASSETS EMPLOYED IN BUSINESS OUTSIDE MASSACHUSETTS

City or Town and State	Real Estate (Col. 1)	Machinery (Col. 2)	Merchandise (Col. 3)	Other Tangible Prop. (Col. 4)	Totals of Columns 1 to 4	
Alpha, N.J.						1.
Carrie Creek, Pa.	$	$	$	$		
Canaston, N.J.						2.
Jamesville, N.Y.						
Lansing, Va.						3. 12498626.06
Wyndover, W.Va.	1267438.32	7644902.82	3518076.15	48208.70		
New York city.						4.
Philadelphia, Pa.						
Pittsburg, Pa.						
Baltimore, Md.						
Savannah, Ga.						
Chicago, Ill.						
Trenton, Ohio						
LaSalle, Ill						
Total Bellevue, Mich.	$	$	$	$		$ 12498626.06

INTANGIBLE ASSETS EMPLOYED OUTSIDE MASSACHUSETTS (Itemize below)

Portion of bank deposits employed outside* $ 121726.56 Portion of accounts receivable* $ 652313.31 Total	$ 774039.85
Portion of patents* $ ..... Portion of good will* $ 1750000.00 Total	1750000.00
Portion of all other intangible assets employed outside (itemize):* 2,053,616.83	4053616.83
Total of all assets employed in business whether within or without Massachusetts (include totals above)	$ 21076282.74

*Refer instruction sheet as to apportionment.

TABLE B — TANGIBLE PROPERTY SITUATED WITHIN MASSACHUSETTS (See Instruction Sheet)

City or Town in which Corporation has an Office, Stores or Factory	Col. 2 Real Estate Values April 1, 1922 Exc. Rents	Col. 3 Machinery Values April 1, 1922 Exc. Rents	Col. 4 Merchandise Values April 1, 1922	Col. 5 Other Tangible Prop. Values April 1, 1922 Exc. Rents	Col. 6 Amounts of Columns of Real Estate, Machinery or Other Tangible Property Included in Col. 5
Boston, Massachusetts	$ None	$ None	$ None	$ 573.	$ None
City or Town in which Corporation has an Office, Stores or Factory					
Totals	$	$	$	$	$

NOTE.—In column 2, include works, structures, real estate, poles, underground conduits, wires and pipes owned within the commonwealth and subject to local taxation. In column 5, include *only* such machinery as is owned by the corporation within the commonwealth, and as is *subject to local taxation*. Other machinery owned by the corporation, if any, should be included in column 5.

QUESTION SUPPLEMENTAL TO TABLE B

Does the corporation own no tangible property in Massachusetts, except furniture and equipment reasonably necessary for the use of the clerk or other executive officers of the corporation? Answer... No tangible property except sales office furniture

TABLE C — SECURITIES HELD IN MASSACHUSETTS (Include both Taxable and Non-Taxable)

Col. 1 Amount of Shares or No. of Values Issued	Col. 2 Complete Description of Securities by Name and Class or Issue	Col. 3 Values April 1, 1922	Legal Tax Certain Values
	None	$	
		$	

SCHEDULE D. ALLOCATION OF INCOME

1. Net income as shown in Schedule A as verified or corrected by Schedule B			$1,247,118.03
2. Interest from bonds, notes, etc., of U. S. included in Federal return	$ 99,076.33		
3. Gains from the sale of capital assets exclusive of those described under Item 8 below	0		
4. Total of Items 2 and 3			$ 99,076.33
5. Difference between Items 4 and 1 (enter also in outside column)			$1,148,041.70 $1,148,041.70

Items 6 and 7 to be answered only by Corporations carrying on business solely in Mass.

6. (a) Average fair cash value of machinery owned and used in Mass. $ ..... × Item 5 =			$ .....
(b) Average value of total assets employed in Mass. $			
7. Difference between Items 6 and 5 = amount taxable at 2½%			$ .....

Items 8 to 17 to be answered only by Corporations carrying on business outside Mass.

8. Gains from the sale of tangible capital assets situated within Mass.		None	
9. Interest from: Mass. corporations; associations, partnerships or trusts having transferable shares and having a principal place of business in Mass.; Mass. inhabitants; excepting interest from Trust Companies and from National Banks		None	
10. Total of Items 8 and 9 (enter also in outside column)		$ None	$ 1,148,041.70
11. Difference between Items 10 and 5 = remainder to be allocated			
12. (a) Average value of tangible property in Mass. $ 573.00			
(b) Average value of all tangible property $ 11,735,209.44	× 1/20 of Item 11 =		11.37
13. (a) Wages, salaries, etc., assignable to Mass. $ 11023.60			
(b) Total wages, salaries, etc. $ 2,507,848.20	× 1/20 of Item 11 =		1,007.24
14. (a) Gross receipts assignable to Mass. $ 424982.70			
(b) Gross receipts from all business $ 1,277,475.05	× 1/20 of Item 11 =		12,704.99

*Note.—If only two of above proportions apply, substitute ¼. If only one of above proportions applies, substitute 1. Do not fail to observe instructions on accompanying sheet.

15. Total of Items 12, 13, and 14			$ 14,330.61
16. (a) Average fair cash value of machinery owned and used in Mass.	None		
(b) Average value of total assets employed in Mass. $	× Item 15 =		.....
17. Difference between Items 16 and 15 = amount taxable at 2½%			$ 14,330.61
18. (a) Total dividends paid Massachusetts inhabitants for year ending Dec. 31, 1920 $ 84	(b) 5% of same	(To Income Sheet)	$ 4.20

SUPPORTING SCHEDULES

The following schedules, where applicable, must be made in support of Schedule D, and firmly attached to this Return:

SCHEDULE D 2 and 3: Submit a detailed schedule of capital assets sold (not stock in trade), describing same and giving location of such of said assets as are tangible.

SCHEDULE D 12: In this schedule state the method used in determining the average values used in Items 12 (a) and (b).

SCHEDULE D 13: In this schedule specify the location of the premises to which wages are assignable and the amount assigned to each such place, whether within or without Mass.

SCHEDULE D 14: In this schedule state amounts of sales and receipts assigned to each place of business, whether within or without Mass.

SCHEDULE D 6 (b) or 16 (b): Submit a schedule describing the assets and stating their value and location.

SUPPLEMENTAL STATEMENT.

No part of the debts of this corporation as set forth in this return has been incurred nor has any office, warehouse or other place of business been maintained in a state other than this commonwealth for the purpose of reducing the amount of taxes to be paid by said corporation.

The corporation, during the year above reported for, rented premises outside Massachusetts at the following places, and the premises were first rented to the corporation at or about the date set after the name of each such place:—

.....

.....

AFFIDAVIT.

I, the treasurer (or *other principal officer*) of the above-named company, being duly sworn, make oath that I have carefully examined the foregoing return, and I further make oath to the best of my knowledge and belief, and from such information as I have been able to obtain, that the items of income as set forth in Schedule A are a true copy of such items as they were included in the balance of income due prior to April 1, 1921, and made to the Collector of Internal Revenue, that as modified as corrected by Schedule B, said items are true and accurate statements and that all other items, statements and all schedules in this return contained, including the accompanying schedules and statements, are true and accurate in each and every particular.

(Signature of treasurer or other principal officer) ..... Jno. J. Matthes .....

(Title of office, as for example "Treasurer") ..... Treasurer .....

Subscribed and sworn to before me, this ..... 20th ..... day of ..... June ..... 1921.

..... John G. Taylor .....
Notary Public —*Justice of the Peace* —
Special Commissioner Boston.

(SEAL)

My commission expires ..... JANUARY 17, 1926 .....

trict sales manager, who himself travels in other States, the only other employee therein being a clerk. The salesmen, four in number, including district sales manager, solicit orders in Massachusetts and in other New England states for cement, packed in sacks, bags or barrels. The orders taken by said salesmen are turned in at said office and then forwarded to the home office of the company at Easton, Pennsylvania, where they are accepted or rejected. If accepted, the merchandise is shipped from the Company's mills located at Martins Creek, Pennsylvania, or Alsen, New York, direct to the consumer. The invoices are sent from the principal office at Easton, Pennsylvania, direct to the consumer and contain a direction that funds in payment be sent direct to Easton. No merchandise is kept in said office located in Boston or anywheres in Massachusetts in [fol. 17] sample form or otherwise. Orders are taken by solicitation at the customer's premises, or are sent by mail. Payments for merchandise are sent by the customer direct to the principal office at Easton, Pennsylvania, the exception being delinquent accounts, which salesmen may at times be instructed to collect. This however, is the exception to the general practice and does not occur frequently. The company keeps no bank account in Massachusetts. The office rent and salesmen's salaries are paid direct from Easton. Incidentals are paid from an impress account of not exceeding $1,000 kept by the district sales manager in his own name. No books of record are kept in Massachusetts. No property of any kind is owned in Massachusetts other than a few hundred dollars worth of office furniture located in the aforesaid office. No merchandise is shipped from one point in Massachusetts to another point in that State, nor from Massachusetts to any other State or country. No meetings of stockholders or directors are held in Massachusetts and no officer or agent of the company has an office in Massachusetts, except the district sales manager above mentioned.

Explanation of Computations in the Accompanying Report

The Alpha Portland Cement Company's Federal Income Tax Return covering the year 1920 was a consolidated Return, the other company participating in the said Return being the Alpha Portland Cement Company of Pennsylvania.

Schedule C—Table A

First Section

The only assets which the corporation has in Massachusetts are the articles of office furniture located in the Boston office, which office, however, is used only for the salesmen as described above. The value of the said office furniture is $573.00. The entire expenses of the said office and the salesmen's salaries are paid from the company's office at Easton, Pennsylvania, the only funds

in Massachusetts being an impress account kept by the district sales manager in his own name and which does not exceed $1,000.00.

Question Supplemental to Table B

The company owns no tangible property in Massachusetts except the office furniture mentioned above. The office in which the furniture is located is under the supervision of the district sales manager [fol. 18] and no officer of the corporation uses the said office.

Schedule D, Item 12

The average value of all the tangible property of the corporation was computed by averaging the monthly balances for the year giving as the result $7,235,209.40. To this amount was added $4,500,000.00 the investment of the Alpha Portland Cement Company in the stock of the Alpha Portland Cement Company of Pennsylvania, a subsidiary company, through which the Alpha Portland Cement Company owns certain properties within the state of Pennsylvania. By the laws of Pennsylvania, the Alpha Portland Cement Company being a New Jersey corporation is limited in its holding of real property in Pennsylvania, and because of this limitation the title to the Alpha Portland Cement Company's mills in that state is vested in the Alpha Portland Cement Company of Pennsylvania, all of the stock of which is owned by the Alpha Portland Cement Company. The latter company operates those mills in Pennsylvania and derives all the income therefrom, all of the revenue going direct to it, the Alpha Company crediting the subsidiary company with a nominal sum as rent to cover depreciation. Since the income from the Pennsylvania real estate is included in the income in this report, the said $4,500,000.00 representing the value of the said Pennsylvania real estate should be included in the value of all the tangible property of the company, as shown in Schedule D, item 12(b). The New York Court of Appeals held that an assessment ignoring the value of properties under the conditions and at the same time including the income therefrom is unconstitutional in People ex rel. Alpha Portland Cement Company v. Knapp, 230 N. Y. 48. A petition to the Supreme Court of the United States for a writ of certiorari to the Court of Appeals has been denied. Item 12(b) has, therefore, been taken as $11,735,209.40.

Schedule D, Item 14

The New England salesmen cover not only the state of Massachusetts but most of the New England states, and the salaries paid to them for the period covered by this report amounted to $17,780.00. The Alpha Portland Cement Company contends that it is not doing business in Massachusetts and it is clear that in no event could more than that proportion of the salesmen's salaries be charged to the Massachusetts business than the percentage of the gross receipts from [fol. 19] Massachusetts purchasers to the gross receipts from the

New England sales, which amounted to $680,681.93. Schedule D, Item 13(a) is therefore $11,023.60.

Dated, June 16th, 1921.

Alpha Portland Cement Company, By Jno. J. Matthes, Treasurer.

EXHIBIT "B" TO PETITION

The Commonwealth of Massachusetts

Department of Corporations and Taxation

237 State House, Boston

Divisions of Corporations

Henry F. Long, Commissioner

Harold S. Lyon, Director

July 7, 1921.

To Alpha Portland Cement Co.,
First National Bank Bldg.,
Easton, Penna.:

Notice of Intention to Assess Income in Excess of that Reported in Return

You are hereby notified, in accordance with the provisions of Chapter 63 of the General Laws, that the taxable net income of the above corporation appears to be in excess of the income shown in Schedule D of its excise tax return for 1921.

It is the intention of the Commissioner of Corporations and Taxation to assess a tax upon the amount stated on the back of this form for the reasons there set forth, at the expiration of ten days after date of this notice, during which time a representative of the corporation is given an opportunity to confer as to the proposed assessment and to explain the apparent incorrectness of the return.

This notice must be returned with any statement desired to be submitted (use the back of this form) or presented in every case where a conference is desired. If the corporation is to be represented [fol. 20] by counsel or otherwise the blank below must be filled in and signed by the treasurer or other principal officer.

Respectfully Yours, Harold S. Lyon, Director of the Division of Corporations, By H. G. D.

The Commissioner, his deputies, clerks and assistants are authorized to disclose the contents of the excise tax return of this corporation to the following-named representative:

(Name of representative:) Louis H. Porter.

(Name of corporation:) Alpha Portland Cement Company.

(Signature of treasurer, or other principal officer:) Jno. J. Matthes (Title of office, as for example, "Treasurer"), Treasurer.

Return This Form

Amount of Increase		$1,039.44
Income as determined	$15,370.06	
Income per return	14,330.62	
	$1,039.44	

Reasons for proposed assessment:
Schedule D, items 12 and 13 refigured as follows:

$$\text{Item 12 } (a)\ \frac{573.00}{(b)\ 7{,}235{,}209.40} \times 382{,}680 = 30.30.$$

$$\text{Item 13 } (a)\ \frac{17{,}780}{(b)\ 2{,}607{,}862.20} \times 382680.56 = 2{,}609.05$$

There seems to be an error in computing this item 14. New computation as follows:

$$14\ (a)\ \frac{424982.70}{12{,}774{,}825.05} \times 38268.56 = 12{,}730.71.$$

Statement of Corporation.
Signed: —— ——.
Title of Office: ——.
No. —; street, ——.
Date: —— —, 19—.
City or Town: ——.
Address reply attention of Mr. —— ——.

[fol. 21] EXHIBIT "C" TO PETITION

To the Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts:

The Alpha Portland Cement Company, for the reasons hereinafter stated, among others, objects to the assessment of any tax upon it by the Commonwealth of Massachusetts and further objects to the assessment of a tax based upon a net income as found by the Commissioner of Corporations and Taxation of said Commonwealth and set forth in the notice of the said Commissioner dated July 7, 1921 addressed to the Alpha Portland Cement Company, which net income is different from that shown by the Company in its 1921 return.

The Alpha Portland Cement Company objects to the assessment of any tax upon it for the reason that it is not doing business in Massachusetts and that its activities as explained in the statement annexed to its return for 1921 constitute Interstate Commerce as defined by many decisions of the Courts of Massachusetts and of the United States and that the assessment of any tax against it is illegal being in

violation of the Commerce Clause and other clauses of the Federal Constitution.

The Alpha Portland Cement Company further objects to the changes in its net income made by the Department of Corporations and Taxation as shown in its letter dated July 7, 1921 for the following reasons.

(*a*) The deduction of $4,500,000 from the denominator of item 12 on page 4 of the return the said $4,500,000 being the value of the investment of the Alpha Portland Cement Company in the stock of Alpha Portland Cement Company of Pennsylvania under the circumstances as set forth in the Statement attached to the return, renders any tax assessed on a net income so found illegal and void and in violation of the 14th amendment and other provisions of the Federal Constitution.

(*b*) The increase in the numerator of item 13, on page 4 of the return so as to cause the said numerator to show the total salaries of the New England salesmen of the Alpha Portland Cement Company instead of that proportion of said salaries attributed to Massachusetts alone as set forth in the said Company's return and in the Statement attached thereto, is illegal and in violation of the provisions of the Federal Constitution.

Dated, July 14, 1921.

Louis H. Porter, Attorney for Alpha Portland Cement Company.

[fol. 22] EXHIBIT "D" TO PETITION

No. 58.9

Foreign Business Corporation

Department of Corporations & Taxation

Division of Corporations

Room 237, State House

[SEAL.]

Boston, September 20, 1921.

To the Treasurer of Alpha Portland Cement Co.,
First National Bank Bldg.,
Easton, Pa.:

Your excise due The Commonwealth of Massachusetts, in accordance with the provisions of chapter 63, General Laws, and Acts in Amendment thereof and in Addition thereto and in accordance with chapter 361 of the Acts of 1921, is as follows:—

Corporate Excess (April 1, 1921) $84,001.21		
Taxable at $5 per $1,000	.....	$420.01
Net Income $15,370. Taxable at 2½ per cent..	$384.25	
Less 5 per cent of Dividends Paid Massachusetts Inhabitants	4.20	
		$380.05
Minimum Tax		.....
Penalties for late filing of return		.....
Total Amount of Tax Due		$800.06
Abated		.....
Net Tax		.....
Interest		.....
Amount Paid		$.....

——— —, 1921.

Send this bill with check payable to The Commonwealth of Massachusetts to the Treasurer of the Commonwealth, Room 227, State House, Boston, Mass.

Notice is hereby given that the above amount will be due and payable, at the Treasurer's Office, Room 227, State House, thirty days from date hereof. Applications for abatement or correction of tax must be made to the Commissioner thirty days from the date of this notice. To avoid interest the tax should be paid when due. [fol. 23] Six per cent interest will be charged if tax is not paid when due: 12 per cent if payment is delayed until proceedings are commenced.

Treasurer's office hours, 9 A. M. to 2 P. M. Saturdays 9 A. M. to 12 M.

Henry F. Long, Commissioner.

[Stamp:] Received Payment. G. Comm. of Mass. Oct. 20, 1921. James Jackson, Treasurer & Rec. Gen'l. [Across face:] Paid under Protest.

EXHIBIT "E" TO PETITION

(Foreign Corporation)

58.9

Send this bill with payment of the Tax to Treasurer of the Commonwealth, Room 227, State House.

The Commonwealth of Massachusetts

Division of Corporations

Department of Corporations & Taxation

Room 237, State House

[SEAL.]

BOSTON, September 20, 1921.

To the Treasurer of Alpha Portland Cement Co.,
First National Bank Bldg.,
Easton, Pa.:

Your tax on net income as reported in your tax return in accordance with the provisions of chapter 493, of the Acts of 1921, is as follows:

Tax on $52.63 ..... $.39

Rate ¾ of 1%.
Payable October 20, 1921.

[fol. 24] Extra Tax

1921

You are hereby notified that the above amount will be payable at the Treasurer's Office, Room 227, State House, on or before October 20, 1921. You are further notified that within ten days from the date hereof, said corporation may apply to The Commissioner of Corporations and taxation for a correction of the above tax.

To save interest the tax should be paid when due. Six per cent interest will be charged if tax is not paid when due.

Checks should be payable to the order of the Commonwealth of Massachusetts.

Treasurer's Office Hours, 9 A. M. to 2 P. M. Saturdays 9 A. M. to 12 M.

Henry F. Long, Commissioner.

EXHIBIT "F" TO PETITION

Alpha Portland Cement Company

Treasury Department: Jno. J. Matthes, Sec'y-Treas. F. G. Lyons, Auditor.

Sales Offices: New York, Philadelphia, Boston, Pittsburgh, Baltimore, Savannah.

Plants: Alpha, N. J.; Manheim, W. Va.; Martins Creek, Pa.; Clementon, N. Y.; Jamesville, N. Y.

General Offices: Easton, Pa.

In your reply please refer to File No.

October 17, 1921.

Treasurer of the Commonwealth of Massachusetts,
Room 227, State House,
Boston, Mass.

DEAR SIR:

Enclosed please find check of the Alpha Portland Cement Company in payment of the tax assessed against it for the year 1921 by The Commonwealth of Massachusetts, amounting to $800.45 as shown by the enclosed bill. This check is sent and the said tax is [fol. 25] paid under protest and the Alpha Portland Cement Company reserves the right to contest the validity of the said tax.

Yours very truly, Alpha Portland Cement Company, By Jno. J. Matthes, Treasurer.

"Concrete for Permanence."

IN SUPREME JUDICIAL COURT

ANSWER OF RESPONDENT, COMMONWEALTH OF MASSACHUSETTS—Filed January 11, 1922

The respondent, Commonwealth of Massachusetts, for answer to the petition in the above cause, says as follows:

1. The respondent admits that the petitioner is a foreign corporation organized and existing under and by virtue of the laws of the State of New Jersey. It is ignorant as to the extent to which the petitioner is engaged in interstate commerce throughout the United States, and leaves the petitioner to prove the same so far as material. It admits that the petitioner maintains an office in the city of Boston in this Commonwealth. It denies that said office is used exclusively for conducting interstate commerce, and says that said office is a usual place of business of the petitioner.

2. The respondent admits that the petitioner, by salesmen engaged by it, solicits orders from customers resident in Massachusetts and neighboring states and that it transmits such orders from its office in Massachusetts to its office at Easton in the Commonwealth of Pennsylvania. The respondent denies that the petitioner's activities within the Commonwealth are exclusively confined to such solicitation and transmission, that the petitioner has confined its operations within this Commonwealth to the solicitation and execution of orders, that all said orders are accepted or rejected at Easton in the commonwealth of Pennsylvania, and that acceptance of all orders takes place outside Massachusetts. The respondent is ignorant as to the purpose for which the petitioner entered this Commonwealth, and leaves the petitioner to prove the same if material. It denies all other allegations contained in said paragraph.

3. The respondent admits that the business of the petitioner consists of the manufacture and sale of cement, that the business here [fol. 26] is conducted by employees, and that the business here is conducted as admitted by paragraph 2 of this answer. It denies all other allegations of paragraph 3 of the petition.

Further answering the respondent says that the petitioner has property located in Massachusetts, ships merchandise to residents of Massachusetts, solicits and negotiates sales from its place of business in Massachusetts, conducts correspondence and pays expenses at said place of business, and performs and carries on in this Commonwealth divers other functions and activities incident to its business of manufacturing and selling cement.

4. The respondent admits that, notwithstanding the petitioner's contention that it was not taxable, the Commissioner of Corporations and taxation on May 17, 1921, notified the petitioner of its failure to file a tax return and in said notice called attention to the statutory penalties for such failure, and that the petitioner on June 22, 1921, and not on June 21, 1921, as alleged, filed a return in substantially the form set forth in Exhibit A annexed to the petition.

5. The respondent admits the allegations of paragraph 5 of the petition.

6. The respondent admits that taxes were assessed to the petitioner, as alleged in paragraph 6 of the petition. The respondent further says that the taxes so assessed were in every respect legal and valid.

7. The respondent admits the allegations of paragraph 7 of the petition.

8. The respondent denies the allegations of paragraph 8 of the petition.

Commonwealth of Massachusetts, By Alexander Lincoln, Assistant Attorney-General.

[File endorsement omitted.]

IN SUPREME JUDICIAL COURT

AGREED STATEMENT OF FACTS—Filed Aug. 18, 1922

The Alpha Portland Cement Company having filed two petitions pursuant to section 77 of chapter 63 of the General Laws praying for the recovery of taxes paid to the Commonwealth of Massachusetts and assessed in the first case for the year 1920 under the provisions of chapter 355 of the Acts of 1919 and chapters 550 and 600 of the Acts of 1920, and in the second case for the year 1921 under the provisions of chapter 63 of the General Laws and chapters 361

and 493 of the Acts of 1921, and the respondent having filed answers to each of the said petitions, it is agreed that in each of the said actions the facts hereinafter stated may be taken as true, and the [fol. 27] Court may draw inferences from the facts stated. The pleadings, consisting of the petition dated August 26, 1921, as amended by permission of the Court on November 29, 1921, and the answer thereto, and the petition dated November 21, 1921, and the answer thereto, may be referred to as the questions of law involved.

(1) The petitioner, Alpha Portland Cement Company, is a corporation organized and existing under the laws of New Jersey. Its principal office is located at Easton, Pennsylvania. The petitioner is engaged in the manufacture and sale of cement, and has mills located in the States of New York, Pennsylvania New Jersey, West Virginia, Ohio, Illinois and Michigan. Cement packed in sacks, bags, or barrels is shipped from these mills to various points in the United States and foreign countries both by rail and water.

(2) The petitioner's activities within the Comonwerlth of Massachusetts are as follows: It leases two rooms in the Board of Trade Building situated at State, Broad, Central, and India Streets, in the City of Boston, which is the only office of the petitioner in Massachusetts. The said office is in charge of a district sales manager, the only other employee therein being a clerk. This clerk is a stenographer and typist, and as such writes such letters as are sent out from the Boston office. He makes up the orders that are turned in at the Boston office, as explained herein, on certain forms which the company has for its business and encloses them in an envelope addressed to the Easton office, where they are accepted or rejected. He keeps a record of shipments into the New England territory. He receives from Easton copies of all the invoices covering material shipped to any customer in the New England states and enters them on a card of record, and periodically turns this information over to salesmen in whose territory shipments have been made. He of course looks after such additional duties as are consistent with any office. The office is used as headquarters by traveling salesmen employed by petitioner, who are four in number, including the district sales manager, who himself travels. These salesmen solicit orders in the Commonwealth of Massachusetts and in other New England states for cement manufactured by petitioner. Orders taken by the salesmen are turned in at said sales office and are then forwarded by mail to the principal office of the company at Easton, Pennsylvania. When the orders so forwarded reach the principal office they are either accepted or rejected. If accepted, the merchandise called for is shipped from the petitioner's mills, located at Martin's Creek, Pennsylvania, or Alsen, New York, direct to the customer. When shipment is made, invoices are prepared at the principal office at Easton, [fol. 28] Pennsylvania, and mailed directly to the customer. The invoices contain a direction that funds in payment be sent directly to the principal office. In substantially all cases the orders are taken by the salesmen upon personal solicitation at the customer's place

of business, but there are also a few instances in which the customer forwards the order by mail to the Boston office, and a few very exceptional cases where a customer gives an order at the Boston office. In every case, however, the orders are forwarded to the principal office at Easton, Pennsylvania, for acceptance or rejection. In no case and under no circumstances are any orders accepted or rejected by the Boston office. Funds in payment for the merchandise shipped are sent by the customer to the principal office at Easton, Pennsylvania, as above stated, but in cases of delinquent accounts or bad credit risks, the credit department at Easton, in approving the contract, sometimes sends word to the salesmen that such an order would only be shipped upon receipt of check in advance. In that case the salesman calls again on the customer and explains the situation and in some instances receives a check. The salesman sends it first to the Boston office, from where it is transmitted to the main office at Easton; or if there is any hurry, the salesman sends the check direct to Easton. In no case is the check made payable to salesmen, but is always payable to the Alpha Portland Cement Company, and is deposited by it at its Easton office. In case of some overdue accounts salesmen are sometimes authorized to request and receive payment. The latter cases are compartive rare and are exceptions to the ordinary course of business, but when funds are so collected by salesmen they are forwarded to the principal office at Easton, Pennsylvania.

(3) No merchandise is kept in the said sales office in sample form or otherwise, nor in any part of the Commonwealth of Massachusetts. None of the merchandise sold to customers is produced or purchased in Massachusetts, all of it being produced in the petitioner's mills at Alsen, New York, or Martin's Creek, Pennsylvania, and shipped from one of the said mills to the customer. No shipments are made from one point in Massachusetts to another point in that Commonwealth, nor from a point in Massachusetts to a point outside of that Commonwealth. The only property owned by petitioner in the Commonwealth of Massachusetts, real or personal, is the office furniture in the sales office, valued at about $500. No bank account is kept in Massachusetts. The salesmen's salaries and office rent are sent directly from the principal office at Easton, Pennsylvania. Incidental expenses in Massachusetts are paid from an account [fol. 29] kept by the district sales manager in his own name, which does not exceed $1,000. Stockholders', directors'' or other corporate meetings have never been held in Massachusetts, and no officer or agent of petitioner has an office there except the district sales manager's office, above specified. No books or records are kept in Massachusetts except as above noted.

(4) The above facts as to the activities of the petitioner within the Commonwealth of Massachusetts were submitted to the Department of Corporations and Taxation of the Commonwealth of Massachusetts in March, 1920, and at other times. On May 17, 1921, the said Department, by letter dated that day addressed to petitioner's

attorneys, decided that the petitioner was subject to the excise tax law and must pay the tax provided therein. By letter May 17, 1921, the said Department notified the petitioner that it must file excise tax returns within twenty days of the date of said notice and that in default thereof penalties would be assessed against it. Petitioner subsequently, and on June 21, 1921, forwarded its returns for the years 1920 and 1921, and filed the same under protest with the Department of Corporations and Taxation. Petitioner stated in schedules annexed to said returns that it was not liable for any tax for the reason that no business was transacted in Massachusetts within the meaning of the excise tax law. The said returns and schedules are annexed to the petitions as "Exhibit A" and are made a part of this agreed statement of facts.

(5) On July 6, 1921, the Commonwealth of Massachusetts assessed a tax against petitioner under the provisions of chapter 355 of the General Laws of 1919, amounting to $975.86, and an additional tax under chapter 550 and 600 of the Acts of 1920, amounting to 53¢, the total tax assessed being $976.39. The petitioner paid said tax on August 4, 1921, under protest.

(6) On September 20, 1921, the Commonwealth of Massachusetts assessed a tax against petitioner under the provisions of chapter 63 of the General Laws and chapter 361 of the Acts of 1921, amounting to $800.06, and an additional tax under chapter 493 of the Acts of 1921, amounting to 39¢, the total tax assessed being $800.45. Petioner paid said tax on October 20, 1921, under protest.

(7) Pursuant to section 77 of chapter 63 of the General Laws, petitioner filed its petition for the recovery of the taxes so paid within six months from the date of payment.

(8) The amount of the tax assessed is not questioned, but may be referred to as bearing on the questions of law presented. No question of valuation is involved.

Warner, Stackpole & Bradlee, Attorneys for Plaintiff. Alexander Lincoln, Assistant Attorney-General.

[fol. 30] [File endorsement omitted.]

Copy.

Attest, —— ——, Clerk.

[fol. 30½] [File endorsement omitted.]

[fol. 31] And afterwards, to wit, on the sixteenth day of April, A. D. Nineteen hundred and twenty-three it was ordered by our said Supreme Judicial Court for the Commonwealth, viz:

[fol. 32] COMMONWEALTH OF MASSACHUSETTS:

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH AT BOSTON, APRIL 16, 1923

RESCRIPT—Filed April 16, 1923

In the case of

[Title omitted]

pending in the Supreme Judicial Court for the County of Suffolk, ordered, that the clerk of said court in said county make the following entry under said case in the docket of said court; viz., Petition dismissed with costs.

By the Court, Walter F. Frederick, Clerk. April 16, 1923.

[fol. 33] [File endorsement omitted.]

[fol. 34] And said rescript was entered in our said Court accordingly.

Whereupon the parties appeared, and further hearing being had upon the rescript the following Final Decree was entered by our said Court, viz:

[fol. 35] COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

SUPREME JUDICIAL COURT

[Title omitted]

FINAL DECREE—Filed May 22, 1923

The above entitled cause came on to be further heard after rescript from the Full Court, and upon consideration thereof it is

Ordered, adjudged and decreed that the petition be and it hereby is dismissed with costs to the respondent taxed in the sum of $28.64.

By the Court, John H. Flynn, Asst. Clerk. May 22, 1923.

[File endorsement omitted.]

[fol. 36] All and singular which premises we have held good by the tenor of these presents to be exemplified.

In testimony whereof we have caused the seal of our said Court to be hereto affixed.

Witness, Arthur P. Rugg, Esquire, Chief Justice of our said Supreme Judicial Court, at Boston, this twelfth day of June in the year of our Lord one thousand nine hundred and twenty-three.

John F. Cronin, Clerk. (Seal.)

[fol. 37] COMMONWEALTH OF MASSACHUSETTS:

SUPREME JUDICIAL COURT

OPINION

Boston, June 11, 1923.

I certify the annexed to be a true copy of the opinion of the Supreme Judicial Court in the case of Alpha Portland Cement Co. vs. Commonwealth, decided on the 16th day of April, 1923.

Ethelbert V. Grabill, Reporter of Decisions.

[fol. 38] RUGG, C. J.:

This is a petition under G. L. c. 63, s. 77, by a foreign corporation having a place of business in this Commonwealth for the abatement of taxes which it contends were illegally exacted for the year 1921. The petitioner is a corporation organized under the laws of New Jersey. Its business is the manufacture and sale of cement. Its principal office is at Easton, Pennsylvania. Its mills are located in several other States outside of Massachusetts, from which shipments are made to various parts of the United States and to foreign countries. It maintains an office in Boston in charge of a district sales manager, with a clerk, where its correspondence and other natural business activities in connection with the receipt of orders and shipments of goods for the New England States are conducted. The office is used as headquarters for traveling salesmen, who solicit orders in Massachusetts and the other New England States. Orders [fol. 39] so taken are transmitted at the Boston office by mail to the principal office at Easton, Pennsylvania, where exclusively they are passed upon, and if accepted, the goods are shipped and invoices sent directly to the customer. Remittances usually are made to the petitioner at Easton, though in exceptional instances prepayments or collections are made by the salesmen and immediately transmitted to Easton. No samples or other merchandise are kept in this Commonwealth. The only property of the petitioner in Massachusetts is its office furniture, valued at $573. It maintains no bank account here, its salaries and office rent being paid from its principal office. Incidental expenses are paid from an account not exceeding $1,000 kept by the district sales manager in his own name. No corporate books, records, or meetings are in Massachusetts. There is no controversy as to the facts, valuations or computation of the tax. The issues between the parties relate solely to the correct interpretation of our corporate tax law as to foreign corporations and to the constitutionality of that law in its application to the petitioner.

The tax here in question was assessed under our corporation tax law now embodied in G. L. c. 63, and a slight additional tax under St. 1921, c. 493. The record shows that the amount of the tax was not affected by St. 1921, c. 361.

Domestic and foreign business corporations as distinguished from banking and insurance corporations and from public service corpo-

rations are defined and provision made for their taxation in G. L. c. [fol. 40] 63, s. s. 30 to 43, those relating particularly to foreign corporations being s.s. 39 to 43. See also s. 52. These relevant sections and St. 1921, c. 493, are printed in the margin.

It is manifest from an examination of these sections (first enacted in St. 1919, c. 355, that the Legislature, departing from earlier corporation tax laws, has attempted to adopt a general principle whereby domestic and foreign corporations shall be treated with fairness on the same footing as to taxation. These sections constitute an effort on the part of the General Court to avoid on the one hand a basis for taxation of foreign corporations offensive to limitations imposed upon the power of the State by the Constitution of the United States, International Paper Co. v. Massachusetts 246 U. S. 135, Cheney Bros. Co. v. Massachusetts, Id. 147, and to minimize on the other hand the preferences in favor of foreign corporations revealed by the practical operation of corporation tax laws hitherto in force. S. S. White Dental Manuf. Co. v. Commonwealth, 212 Mass. 35, 48, 49. Judson Freight Forwarding Co. v. Commonwealth, 242 Mass. 47, 52. This tax law, placing as it does both domestic and foreign corporations on common ground as to taxation except so far as essential differences require different treatment in details, follows the policy established in this Commonwealth for many years of levying an excise instead of a property tax on corporate franchises and corporate transaction of business. Eaton, Crane & Pike Co. v. Commonwealth, 237 Mass. 523.

The general scheme of this tax law is that an excise is levied on both domestic and foreign business corporations doing business in this Commonwealth. Real estate and machinery used in manufacture of such corporations alone are subject to a local property tax in the city or town where situated. All other personal property, [fol. 41] whether tangible or intangible is exempt from direct or local taxation. The amount of the excise tax is measured as to a foreign corporation, s. 39, by the sum of "an amount equal to five dollars per thousand on the value of the corporate excess employed by it in the Commonwealth," and "an amount equal to two and one-half per cent of that part of its net income as defined in section thirty and in this section, which is derived from business carried on in this Commonwealth," with a further provision that a minimum tax of not less than one-twentieth of one per cent of such proportion of the fair cash value of its shares of capital stock as its assets employed in business in this Commonwealth bear to its total assets employed in business. "Corporate excess employed within the Commonwealth" by a foreign corporation is defined by s. 30, 4, to be such proportion of the fair cash value of all its shares of capital stock as the value of its real and personal assets employed in business within the Commonwealth bears to the value of its total assets on a specified date less the value of (a) real estate and machinery with other structures not here material owned by it within the Commonwealth and subject to local taxation, and (b) securities held within the Commonwealth, the income of which if held by a natural per-

son would not be subject to taxation with certain exceptions. "Net income" means in general the net income for the taxable year required to be returned to the Federal government by the Federal revenue act of nineteen hundred eighteen, less interest received on bonds, notes and certificates of indebtedness of the United States. s. 30, 5.

The statute is an attempt to measure the excise on foreign corporations solely by the property and net income fairly attributable [fol. 42] to the business done within this Commonwealth. This excise tax is in place of any other tax on personal property within the Commonwealth from which, except as to machinery used in manufacture or in supplying and distributing water, foreign corporations (and also domestic corporations) are expressly exempted by G. L. c. 59, s. 5, Sixteenth. Comparison of the sections of the tax act relating to the taxation of domestic corporations with those relating to foreign corporations shows that the same general definitions, exemptions and principles are followed as to both, except as the inherent differences as to domicile and as to allocation of residue of net income and of corporate excess require dissimilar provisions.

It is rightly conceded by the attorney general that the petitioner was engaged in this Commonwealth exclusively in interstate commerce. Marconi Wireless Telegraph Co. v. Com. 218 Mass. 558, 567 to 569. Cheney Bros. Co. v. Mass. 246 U. S. 147, 153.

The question to be decided is whether a foreign corporation having a usual place of business in this Commonwealth used for interstate commerce alone is subject to taxation under the tax law. The precise point now presented for decision was left open in Judson Freight Forwarding Co. v. Commonwealth, 242 Mass. 47, although the act in general was there held to be constitutional.

As matter of verbal construction it is plain that the tax law includes a foreign corporation such as the petitioner. Confessedly the petitioner "has a usual place of business in the Commonwealth" and is actually carrying on business here. The petitioner comes within the description of s. 30, 2, where foreign corporation is defined as including every corporation "chartered under laws other [fol. 43] than those of this Commonwealth for purposes for which domestic corporations may be organized under chapter one hundred fifty-six, which has a usual place of business in this Commonwealth." whether these statutory words are to be interpreted so as to include foreign corporations engaged here exclusively in interstate commerce depends upon the further inquiry whether as thus construed the statute would be constitutional. Attorney General v. Electric Storage Battery Co. 188 Mass. 239, 240, 241. Baltic Mining Co. v. Commonwealth, 207 Mass. 381, 390. This controversy can be settled finally only by the Supreme Court of the United States. But it must be dealt with by this court and considered in the light of decisions of that tribunal, as we understand them.

The present tax act differs in its essential characteristics from those hitherto enacted respecting foreign corporations. The effect of St. 1903, c. 437, s. 75 and St. 1909, c. 490, Part III, s. 56, was to impose excises which prescribed the terms and conditions on which

foreign corporations could do business within the Commonwealth, and which were in the nature of license fees as conditions precedent to the doing of such business. They were taxes upon the privilege of having an establishment for business in Massachusetts. They were not property taxes. The right to do business depended upon the payment of the tax, and prohibitive penalties followed failure to comply with the statutes and to make the specified payments. Baltic Mining Co. v. Commonwealth, 207 Mass. at 388. Since the several states under the Constitution of the United States have no right to impose restrictions or regulations upon interstate commerce, it was held that these tax statutes did not apply to corporations [fol. 44] engaged solely in interstate commerce at a place of business within the Commonwealth. Marconi Wireless Telegraph Co. v. Commonwealth, 218 Mass. 558, 561, 563-565, 567-569 and cases there collected. Old Dominion Co. v. Commonwealth, 237 Mass. 269.

The present tax act imposes the excise with respect to the carrying on of business by foreign corporations within the Commonwealth. It is an excise for the privilege of having a place of business under the protection of our laws and with the financial, commercial and other advantages flowing therefrom, measured solely by the property and net income fairly attributable to the business done here by a foreign corporation. The excise is measured by two factors, (1) the value of the corporate excess employed within the Commonwealth, and (2) the net income derived from business within the Commonwealth.

1. The value of the corporate excess employed in the Commonwealth as a factor of the tax is not measured by the capital stock of the corporation. If it were, it would be invalid. International Paper Co. v. Massachusetts, 246 U. S. 135. It is measured by the value of the property of the foreign corporation, including its franchise, employed in the Commonwealth, after certain deductions are made. It seems to us that this factor of the tax stands under the protection of several decisions of the Supreme Court of the United States.

The right of a state to tax tangible property of a foreign corporation, not in transit but located within its borders, no matter what may be its use, is well settled. The petitioner has a small amount of tangible personal property permanently within the Commonwealth, upon which it pays no tax except by way of this factor of [fol. 45] the excise.

The petitioner exercises within the Commonwealth its franchise to do business as a corporation. It did whatever was necessary to conduct a business yielding according to its return annual gross receipts assignable to Massachusetts of $424,982.70. The facts in Western Union Telegraph Co. v. Massachusetts, 125 U. S. 530, were that an excise was levied upon a telegraph company exercising a franchise in many states by virtue of laws of the United States and having poles and wires in this Commonwealth. If there was said that the state law attempted "to ascertain the just amount which

any corporation engaged in business within its limits shall pay as a contribution to the support of its government upon the amount and value of the capital so employed by it therein. * * * The tax * * * is in effect a tax * * * on account of property owned and used * * * in the State of Massachusetts." It was said in Pullman's Car Co. v. Pennsylvania, 141 U. S. 18, a case involving the taxation of cars used in interstate commerce, at 25, "The tax now in question is not a license tax or a privilege tax; it is not a tax on business or occupation; * * * The tax is imposed equally on corporations doing business within the State, whether domestic or foreign, and whether engaged in interstate commerce or not." See also Pullman Co. v. Richardson, decided March 12, 1923, 260 U. S. —. In Atlantic & Pacific Telegraph Co. v. Philadelphia, 190 U. S. 160, at 163, occur these words: "The franchise of a corporation, although that franchise is the business of interstate commerce, is, as a part of its property, subject to state taxation, providing at least the franchise is not derived from the United States." In United States Express Co. v. Minnesota, [fol. 46] 223 U. S. 335, at 345, it was said, "The State must be allowed to tax the property and to tax it at its actual value as a going concern. On the other hand the State cannot tax the interstate business. The two necessities hardly admit of an absolute logical reconciliation. Yet the distinction is not without sense. When a legislature is trying simply to value property, it is less likely to attempt to or effect injurious regulation than when it is aiming directly at the receipts from interstate commerce. A practical line can be drawn by taking the whole scheme of taxation into account."

It is manifest as matter of common business knowledge that commerce within this Commonwealth yielding to the petitioner annual gross receipts of $424,982.70 must have involved credits, bills receivable and obligations to it of considerable amounts. No contention to the contrary has been urged by the petitioner. Such credits, bills receivable and obligations might be made subject to direct taxation within the Commonwealth by appropriate legislation under numerous decisions of the United States Supreme Court. Such credits, bills receivable and obligations constitute a part of "the value of the assets" of the petitioner "employed in * * * [its] business within the Commonwealth" used as the basis of ascertaining "the corporate excess" of the petitioner "employed within the Commonwealth" upon which this factor of the excise is calculated.

This branch of the case seems to us to come within the scope of these words in Shaffer v. Carter, 252 U. S. 37, at 52: "This is consonant with numerous decisions of this court sustaining state taxation of credits due to non-residents. New Orleans v. Stempel, [fol. 47] 175 U. S. 309, 320 et seq.; Bristol v. Washington County, 177 U. S. 133, 145; Liverpool &c. Ins. Co. v. Orleans Assessors, 221 U. S. 346, 354; and sustaining federal taxation of the income of an alien non-resident derived from securities held in this country. De Ganay v. Lederer, 250 U. S. 376." Blackstone v. Miller, 188 U. S. 189, 205, 206.

It appears to us that under the principle deducible from all these decisions the tax, so far as it relates to the value of corporate excess of the petitioner, rightly may be levied.

2. The tax, as measured by the net income from business transacted in Massachusetts as a factor, is dependent upon net profits derived solely from interstate commerce. But there is no discrimination in the statute against interstate commerce. This net income is used as a measure applicable to all corporations alike. While not an income tax according to strict definition, in substance it affects net income alone, is measured by net income alone, is reasonable in amount and incidence, and is payable out of net income.

It was settled by Travis v. Yale & Towne Mfg. Co. 252 U. S. 60, that the income of non-residents was subject to taxation within the state where earned or accruing. That result was reached on the ground that, except in the particular restrictions imposed by the Federal Constitution, the states have complete dominion over persons, business and property within their borders, are charged with the duty of maintaining order and establishing security for such persons, business and property, and consequently may resort to any proper form of taxation of those deriving benefits from their protection in [fol. 48] order to defray expenses of government. In Peck & Co. v. Lowe, 247 U. S. 165, question arose as to the right of Congress, in view of the constitutional prohibition against laying a "tax or duty" "on articles exported from any state," to tax net income derived by a domestic corporation chiefly from shipping goods to foreign countries and there selling them. It was said, p. 174, "The tax in question is unlike any of those heretofore condemned. It is not laid on articles in course of exportation or on anything which inherently or by the usages of commerce is embraced in exeportation or any of its processes. On the contrary, it is an income tax laid generally on net incomes. And while it cannot be applied to any income which Congress has no power to tax * * *, it is both nominally and actually a general tax. It is not laid on income from exportation because of its source, or in a disc-iminative way, but just as it is laid on other income. The words of the act are 'net income arising or accruing from all sources.' There is no discrimination. At most, exportation is affected only indirectly and remotely." In Shaffer v. Carter, 252 U. S. 37, a state statute taxing a non-resident for income derived from property and business within the state, was assailed. It was said at page 57, "It is urged that, regarding the tax as imposed upon the business conducted within the State, it amounts in the case of appellant's business to a burden upon interstate commerce, because the products of his oil operations are shipped out of the State. Assuming that it fairly appears that his method of business constitutes interstate commerce, it is sufficient to say that the tax is imposed not upon the gross receipts, as in Crew Levick Co. v. Pennsylvania, 245 U. S. 292, but only upon the net proceeds, and is plainly sus-[fol. 49] tainable even if it includes net gains from interstate commerce. U. S. Glue Co. v. Oak Creek, 247 U. S. 321. Compare Peck & Co. v. Lowe, 247 U. S. 165." In United States Glue Co. v. Oak Creek, 247 U. S. 321, the distinction was pointed out between an

invalid tax based on gross revenue and a valid tax based on net profits. It was said at pp. 328 329, "The correct line of distinction is so well illustrated in two cases decided at the present term that we hardly need go further. In Crew Levick Co. v. Pennsylvania, 245 U. S. 292, we held that a state tax upon the business of selling goods in foreign commerce, measured by a certain percentage of the gross transactions in such commerce, was by its necessary effect a tax upon the commerce, and at the same time a duty upon exports, contrary to S. S. 8 and 10 of Article 1 of the Constitution, since it operated to lay a direct burden upon every transaction by withholding for the use of the State a part of every dollar received. On the other hand, in Peck & Co. v. Lowe, ante, 165, we held that the Income Tax Act of October 3, 1913, c. 16, s. 2, 38 Stat. 166, 172, when carried into effect by imposing an assessment upon the entire net income of a corporation, approximately three-fourths of which was derived from the export of goods to foreign countries, did not amount to laying a tax or duty on articles exported within the meaning of Art. 1, s. 9, cl. 5 of the Constitution. The distinction between a direct and an indirect burden by way of tax or duty was developed, and it was shown that an income tax laid generally on net incomes, not on income from exportation because of its source or in the way of dis-
[fol. 50] c-imination, but just as it was laid on other income, and affecting only the net receipts from exportation after all expenses were paid and losses adjusted and the recipient of the income was free to use it as he chose, was only an indirect burden. The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or so to diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large. Such a tax, when imposed upon net incomes from whatever source arising, is but a method of distributing the cost of government, like a tax upon property, or upon franchises treated as property; and if there be no discrimination against interstate commerce, either in the admeasurement of the tax or in the means adopted for enforcing it, it constitutes one of the ordinary and general burdens of government, from which persons and corporations otherwise subject to the jurisdiction of the States are not exempted by the Federal Constitution because they happen to be engaged in commerce among the States." In Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113 at 119 it was said, "Payment of the tax is not made a condition precedent to the right of the corporation to carry on business, including interstate busi-
[fol. 51] ness. Its enforcement is left to the ordinary means of

collecting taxes. St. Louis Southwestern Ry. Co. v. Arkansas, 235 U. S. 350, 364; Atlantic & Pacific Telegraph Co. v. Philadelphia, 190 U. S. 160, 163. The statute is, therefore, not open to the objection that it compels the company to pay for the privilege of engaging in interstate commerce. A tax is not obnoxious to the commerce clause merely because imposed upon properly used in interstate commerce, even if it takes the form of a tax for the privilege of exercising its franchise within the State. Postal Telegraph Cable Co. v. Adams, 155 U. S. 688, 695. This tax is based upon the net profits earned within the State. That a tax measured by net profits is valid, although these profits may have been derived in part, or indeed mainly, from interstate commerce is settled. United States Glue Co. v. Oak Creek, 247 U. S. 321; Shaffer v. Carter, 252 U. S. 37, 57." Hump Hairpin Co. v. Emmerson, 258 U. S. 290, 294. Attorney General v. Bay State Mining Co., 99 Mass. 148.

It seems to us that the constitutionality of the statute in the particulars here assailed is sustained by the decisions of the United States Supreme Court already cited and from some of which quotations have been made. The principles there declared, as we understand them, support the validity of the tax act here involved. In reaching that conclusion we are not unmindful of all that has been said and decided in Western Union Telegraph Co. v. Kansas, 216 U. S. 1; Looney v. Crane Co. 245 U. S. 135; Meyer v. Wells Fargo & Co. 223 U. S. 298; International Paper Co. v. Massachusetts, 246 U. S. 135; Wallace v. Hines, 253 U. S. 66; Gillespie v. Oklahoma, 257 U. S. 501. The case at bar appears to us to be governed by the other line of decisions. See 32 Harvard Law Review, 634-640, 646-649 and cases there collected and reviewed. Superior v. Allouez Bay [fol. 52] Dock Co. 10 166 Wis. 76, 80. The principle that the states can impose no direct burden upon interstate commerce, illustrated by cases like McCall v. California, 136 U. S. 104; Norfolk & Western Railroad v. Pennsylvania, 136 U. S. 114; International Text Book Co. v. Pigg, 217 U. S. 91; Crenshaw v. Arkansas, 227 U. S. 389, and Rogers v. Arkansas, 227 U. S. 401, appear to us to be inapplicable to the case at bar in that they related to statutes which imposed that which in essence was a license fee as a condition prerequisite to doing interstate commerce.

The tax considered as a whole with both its main factors is general in nature and reasonable in amount. The tax upon the petitioner in substance and effect, so far as concerns the factor of its corporate excess employed within the Commonwealth, is levied upon its tangible personal property within the Commonwealth, upon the credits due it from debtors within this Commonwealth, and upon the exercise of its franchise within this Commonwealth, and, so far as concerns the factor of its income, upon the net income derived from business in this Commonwealth, after all losses and expenses have been paid. It is not directed against interstate commerce or property outside the state but is confined to business done, property located, capital employed and net income earned within the Commonwealth. It affects interstate commerce indirectly and is not an immediate burden upon it. It affords to the state only a fair

and reasonable revenue for the maintenance of the government of the protection of which the petitioner enjoys the benefits. Our conclusion is that the law thus construed, as applying to a foreign corporation using a part of its property exclusively for interstate com- [fol. 53] merce within the Commonwealth, violates no guaranty established by the Constitution of the United States. The tax statute, therefore, is interpreted as applying to a corporation engaged in business within the Commonwealth as is the petitioner.

It is doubtful whether the remaining point argued by the petitioner is open under the last paragraph of the agreed facts, viz., "The amount of the tax assessed is not questioned, but may be referred to as bearing on the questions of law presented. No question of valuation is involved." This appears to preclude inquiry now into the details of the computation or the methods of calculation, and to leave open only questions whether the statute on its face, according to its correct interpretation, is unconstitutional in its application to the facts under which the petitioner does business.

But if the matter be treated on its merits, the contention of the petitioner that its property outside the Commonwealth has been included in the tax and hence that it has been deprived of its property without due process of law, contrary to the Fourteenth Amendment to the United States Constitution, seems to us without substantial merit. This contention is founded on the method of allocation adopted by the commissioner. In the case of a foreign corporation not transacting its entire business within the Commonwealth, the tax is based, so far as concerns the proportion of net income allocated to this Commonwealth on (1) precentage of tangible assets in Massachusetts to all tangible assets, (2) percentage of wages assignable to Massachusetts to total wages, and (3) percentage of gross receipts assignable to Massachusetts to gross receipts from all its business. There is in this problem no reference to stocks, bonds [fol. 54] or intangible securities, except bonds, notes and certificates of indebtedness of the United States. Such assets do not enter into the calculation or allocation. It seems to us that the question in this connection is not whether a subsidiary percentage standing alone may impinge upon property outside the Commonwealth, but whether the use of all the percentages makes the final result a tax which violates constitutional guarantees. The several percentages are not taxes levied upon the terms employed. They are used in combination to ascertain a sum which in amount as applied to all corporations may be reasonable. The tax so far as concerns this factor is measured upon net income alone and is only payable out of net income. Excises may be measured to some extent by property not subject to direct taxation. Commonwealth v. Hamilton Mfg. Co. 12 Allen, 298, 306, 307. Hamilton Mfg. Co. v. Massachusetts, 6 Wall. 632, 639, 640. Flint v. Stone Tracy Co. 220 U. S. 107, 165. The aim of the statute in this particular is to reach only profits earned within the State. The total net income for the year was $1.148,041.70, of which $15.370.06 was allocated to Massachusetts. The gross receipts assignable to Massachusetts, according to the petitioner's return, were $424,982.70, out of a total of $12,774,

$25.05. The facts do not appear to us to show that the proportion of net income ultimately allocated to this Commonwealth was in excess of the just amount. We think that the case in this respect is within the authority of Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113. Our statute in its phrase is different from that under consideration in People ex rel. Alpha Portland Cement Co. v. Knapp, 230 N. Y. 48, 231 N. Y. 516.

The same reasoning applies to the suggestion that the tax is invalid because wages paid in connection with the Massachusetts office [fol. 55] included in part services rendered by traveling salesmen going to other states as well as Massachusetts.

Petition dismissed with costs.

[fol. 56] APPENDIX

G. L., c. 63

Section 30. When used in this section and sections thirty-one to fifty-two inclusive, the following terms shall have the following meanings:

1. "Domestic business corporation," every corporation organized under or subject to chapter one hundred and fifty-six.

2. "Foreign corporation," every corporation, association or organization established, organized or chartered under laws other than those of the commonwealth, for purposes for which domestic corporations may be organized under chapter one hundred and fifty-six, which has a usual place of business in this commonwealth, or is engaged here, permanently or temporarily, in the construction, erection, alteration or repair of a building, bridge, railroad, railway or structure of any kind.

3. "Corporate excess," in the case of a domestic business corporation, the fair cash value of all the shares constituting the capital stock of a corporation on the first day of April when the return called for by section thirty-five is due, less the value of the following:

(a) The works, structures, real estate, machinery, poles, underground conduits, wires and pipes owned by it within the commonwealth subject to local taxation, except such part of said real estate as represents the interest of a mortgagee.

(b) Securities, the income of which, if any, if received by a natural person resident in this commonwealth, would not be liable to taxation, except shares in national banks and voluntary associations, trusts and partnerships.

[fol. 57] (c) Its real estate, machinery, merchandise and other tangible property situated in another state or country, except such part thereof as represents the interest of a mortgagee.

(d) If any portion of its cash and accounts and bills receivable, excluding notes, is attributable to an office outside of the commonwealth, the same proportion of its cash and accounts and bills receivable, excluding notes, which its real estate, machinery and merchandise situated in another state or country bear to its total real estate, machinery and merchandise, to the extent that such proportion fairly represents, in the judgment of the commissioner, the amount which is properly allocable to such other state or country.

4. "Corporate excess employed within the commonwealth" by a foreign corporation, such proportion of the fair value of all the shares constituting the capital stock on the first day of April when the return called for by section thirty-five is due as the value of the assets, both real and personal, employed in any business within the commonwealth on that date, bears to the value of the total assets of the corporation on said date, less the value of the following:

(a) Works, structures, real estate, machinery, poles, underground conduits, wires and pipes owned by it within the commonwealth subject to local taxation, except such part of said real estate as represents the interest of a mortgagee;

(b) Securities held in the commonwealth, the income of which, if any, if received by a natural person resident therein, would not [fol. 58] be liable to taxation, except shares in national banks, voluntary associations, trusts and partnerships. In determining the proportion of assets employed within the commonwealth, the commissioner may include such bank deposits in other states as are employed, principally in the conduct of the business in the commonwealth.

5. "Net income," except as otherwise provided in sections thirty-four and thirty-nine, the net income for the taxable year as required to be returned by the corporation to the federal government under the federal revenue act of nineteen hundred and eighteen, and, in the case of a domestic business corporation, such interest and dividends, not so required to be returned as net income, as would be taxable if received by an inhabitant of this commonwealth; less, both in the case of a domestic business corporation and of a foreign corporation, interest, so required to be returned, which is received upon bonds, notes and certificates of indebtness of the United States.

6. "Taxable year," the fiscal or calendar year for which the corporation was required to make its last return to the federal government due prior to April first of the year in which the tax is to be assessed, or, if such return was for a fractional period, a full year, including and ending with such fractional period.

Section 31. In determining the corporate excess of a domestic business corporation, or the corporate excess employed within the commonwealth by a foreign corporation, there shall not be deducted the value of shares in national banks and in voluntary associations, [fol. 59] trusts and partnerships, nor of other securities the income

of which, if owned by a natural person resident in this commonwealth, would be liable to taxation, nor shall there be deducted the value of any shares of stock of the corporation itself owned directly or indirectly by it or for its benefit; and the commissioner, in determining for the purposes of taxation the value of the corporate excess of, or corporate excess employed within the commonwealth by, any such corporation, shall not take into consideration any debts of the corporation unless he is satisfied that no part of such debts was incurred for the purpose of reducing the amount of taxes to be paid by it, and, in the case of a domestic business corporation which is a subsidiary of a foreign corporation or closely affiliated therewith by stock ownership, that such debts represent only the fair value of the property given therefor.

Section 32. Except as otherwise provided in sections thirty-three and thirty-four, every domestic business corporation shall pay annually, with respect to the carrying on or doing of business by it, an excise equal to the sum of the following, provided that every such corporation shall pay annually a total excise not less in amount than one twentieth of one per cent of the fair cash value of all the shares constituting its capital stock on the first day of April when the return called for by section thirty-five is due:

(1) An amount equal to five dollars per thousand upon the value of its corporate excess.

(2) An amount equal to two and one half per cent of that part of its net income, as defined in this chapter, which is derived from business carried on within the commonwealth.

[fol. 60] Section 33. If a domestic business corporation which is a subsidiary of a foreign corporation or closely affiliated therewith by stock ownership, is so managed that its books of account do not show its true earnings, it shall pay as a minimum tax under this chapter an amount equal to twenty dollars per thousand on its corporate excess, unless it shall file within the first ten days of April a statement, as of April first, of its net income showing to the satisfaction of the commissioner its true earnings for its last prior fiscal year, eliminating therefrom all payments to such other corporation or its officers in excess of the fair value of the property or services given therefor.

Section 34. If two or more domestic business corporations participated in the filing of a consolidated return of income to the Federal government, the tax under paragraph (2) of section thirty-two may, at their option, be assessed upon their combined net income, which tax shall be assessed to all said corporations and collected from any one or more of them. In the case of domestic business corporations thus affiliated and not electing, under the foregoing provision, to be assessed upon their combined net income, and in the further case of one or more domestic business corporations filing with one or more foreign corporations a consolidated return of net income to the Fed-

eral government, each such domestic business corporation shall file with the commissioner, as a part of its return required by this chapter, a statement of net income in such form as he may prescribe, showing its gross income and deductions in accordance with the law [fol. 61] and regulations governing the usual Federal returns of corporations not thus affiliated, and the net income thus shown, after making deductions therefrom and additions thereto as provided in paragraph five of section thirty, shall be the "net income" under this chapter.

Section 35. Every domestic business corporation shall, within the first ten days of April, make a return as of April first, sworn to by its treasurer or assistant treasurer, or in their absence or incapacity by any other principal officer, in such form as the commissioner prescribes, giving (a) a copy of such parts as he may designate of the Federal return or returns for the year on the income of which the tax is to be assessed, which it has made singly or with one or more other corporations, (b) such other data as he requires to determine the proportion of net income derived from business carried on within the commonwealth, (c) such information as he requires for the determination of the corporate excess. Whenever the time for filing its Federal return has been extended, the commissioner may extend the time for filing such return.

Section 36. If the assessment made by the Federal government is based upon a net income greater or less than the net income returned by said corporation, or if an additional assessment is at any time made on the ground that the net income was incorrectly returned in the first instance, or if, after the tax as assessed is paid to the Federal government, any part of such tax is refunded, the corporation, within ten days after the receipt of such notice of said fact, shall make return on oath to the commissioner of the amount by which the net income originally returned differs from the net income on which the tax was computed by the Federal government [fol. 62] upon the latest determination by it of the proper tax, and of the facts giving rise to the difference. If upon such facts an additional tax is due the commonwealth, the commissioner shall assess the additional tax, and the corporation shall, within thirty days after receipt of notice from the commissioner of the amount thereof, pay such additional tax. If upon said facts a less tax is due the commonwealth than that paid by the corporation, the State treasurer shall, upon certification of the commissioner, repay within thirty days such difference without any further statutory appropriation therefor.

Section 37. The commissioner shall determine, in the manner provided in this and the following section, the part of the net income of a domestic corporation derived from business carried on within the commonwealth. The following classes of income shall be allocated as follows:

(a) Interest and dividends which would be taxable under section one of chapter sixty-two, if received by an inhabitant of the commonwealth, shall be allocated to this commonwealth.

(b) Gains realized from the sale of capital assets, if such assets consist of intangible property or if they consist of real estate or tangible personal property situated in the commonwealth, shall be allocated to this commonwealth.

(c) Gains received from the sale of capital assets, if such assets consist of real estate or tangible personal property situated outside the commonwealth, shall not be allocated in any part to this commonwealth.

[fol. 63] Section 38. Income of the classes described in the preceding section having been allocated, the remainder of the net income as defined in section thirty shall be allocated as follows:

1. If the corporation carries on no business outside the commonwealth, the whole of said remainder shall be allocated to this commonwealth.

2. If the corporation carries on any business outside the commonwealth, the said remainder shall be divided into three equal parts:

(a) Of one third, such portion shall be attributed to business carried on within the commonwealth as shall be found by multiplying said third by a fraction whose numerator is the value of the corporation's tangible property situated within the commonwealth and whose denominator is the value of all the corporation's tangible property wherever situated.

(b) Of another third, such portion shall be attributed to business carried on within the commonwealth as shall be found by multiplying said third by a fraction whose numerator is the expenditure of the corporation for wages, salaries, commissions or other compensation to its employees, and assignable to this commonwealth as hereinafter provided, and whose denominator is the total expenditure of the corporation for wages, salaries, commissions or other compensation to all its employees.

(c) Of the remaining third, such portion shall be attributed to business carried on within the commonwealth as shall be found by multiplying said third by a fraction whose numerator is the amount [fol. 64] of the corporation's gross receipts from business assignable to this commonwealth as hereinafter provided, and whose denominator is the amount of the corporation's gross receipts from all its business.

3. In a case where only two of the foregoing three rules are applicable, the said remainder of net income of the corporation shall be divided into two equal parts only, each of which shall be apportioned in accordance with one of the remaining two rules. If only one of

the three rules is applicable, the part of the net income received from business carried on within the commonwealth shall be determined solely by that rule.

4. The value of the corporation's tangible property for the purposes of this section shall be the average value of such property during the taxable year.

5. The amount assignable to this commonwealth of expenditure of the corporation for wages, salaries, commissions or other compensation to its employees shall be such expenditure for the taxable year as represents the compensation of employees not chiefly situated at, connected with or sent out from premises for the transaction of business owned or rented by the corporation outside the commonwealth.

6. The amount of the corporation's gross receipts from business assignable to this commonwealth shall be the amount of its gross receipts for the taxable year from (a) sales, except those negotiated or effected in behalf of the corporation by agents or agencies chiefly situated at, connected with or sent out from premises for the trans- [fol. 65] action of business owned or rented by the corporation outside the commonwealth and sales otherwise determined by the commissioner to be attributable to the business conducted on such premises, (b) rentals or royalties from property situated, or from the use of patents, within the commonwealth; provided, that upon application by a corporation which owns or controls substantially all the capital stock of another corporation, or by the corporation so owned or controlled, the commissioner may impose the tax provided for by this chapter upon the income of the two corporations jointly in the same manner as though they were a single corporation, or may, in such other manner as he shall determine, equitably adjust the tax of the applying corporation.

7. If a corporation maintains an office, warehouse or other place of business in a State other than this commonwealth for the purpose of reducing its tax under this chapter, the commissioner shall, in determining the amount of its gross receipts from business assignable to this commonwealth, include therein the gross receipts from sales attributed by the corporation to the business conducted at such place of business in another State.

8. In the case of consolidated returns of net income, the commissioner shall allocate such income, so far as practicable, in accordance with the above rules.

9. A rule shall not be deemed to be inapplicable merely because all the tangible property of the expenditure of a corporation for wages, salaries commissions or other compensation, or the gross receipts of the corporation, are found to be situated, incurred, or received without the commonwealth.

[fol. 66] 10. From the net income allocated to this commonwealth there shall be deducted the same proportion thereof which the fair

cash value of machinery owned by the corporation and used in manufacturing in the commonwealth bears to its total assets employed therein, and the amount remaining shall be its net income subject to tax under this chapter.

Section 39. Every foreign corporation shall pay annually, with respect to the carrying on or doing of business by it within the commonwealth, an excise equal to the sum of the following, provided that every such corporation shall pay annually a total excise not less in amount than one twentieth of one per cent of such proportion of the fair cash value of all the shares constituting its capital stock as the assets, both real and personal, employed in any business within the commonwealth on April first following the close of the taxable year, bear to the total assets of the corporation employed in business on said date:

(1) An amount equal to five dollars per thousand upon the value of the corporate excess employed by it within the commonwealth.

(2) An amount equal to two and one half per cent of that part of its net income, as defined in section thirty and in this section, which is derived from business carried on within the commonwealth.

If two or more foreign corporations doing business in this commonwealth participated in the filing of a consolidated return of income [fol. 67] to the federal government, the tax under paragraph (2) above may, at their option, be assessed upon their combined net income, in which case the tax shall be assessed to all said corporations and collected from any one or more of them. Foreign corporations thus affiliated and doing business in this commonwealth, which do not elect, under the foregoing provision, to be assessed upon their combined net income and all other foreign corporations doing business in this commonwealth, which have filed with one or more corporations not subject to this section a consolidated return of net income to the federal government, shall each file with the commissioner, as a part of the return required by this chapter, a statement of net income in such form as he may prescribe, showing the gross income and deductions in accordance with the law and regulations governing the usual federal returns of corporations not thus affiliated; and the net income thus shown, after making deductions therefrom and additions thereto as provided in paragraph five of section thirty, shall be the "net income" under this chapter.

Section 40. Every foreign corporation shall make returns as provided in sections thirty-five and thirty-six; and all provisions of said sections shall apply to such corporations, except that the term "corporate excess" in said section thirty-five shall, in the case of a foreign corporation mean the corporate excess employed by it within the commonwealth.

Section 41. The commissioner shall determine in the manner provided in this section the part of the net income of a foreign corporation derived from business carried on within the commonwealth.

The following classes of income shall be allocated as follows:

(a) Gains realized from the sale of capital assets, if such [fol. 68] assets consist of real estate or tangible personal property situated in the commonwealth, shall be allocated to this commonwealth.

(b) Interest received from any corporation organized under the laws of the commonwealth or from any association, partnership or trust having transferable shares and having its principal place of business in the commonwealth, or from any inhabitant of the commonwealth, except interest received on deposits in trust companies or in national banks doing business in the commonwealth, shall be allocated to this commonwealth.

(c) Gains realized from the sale of capital assets other than those named in paragraph (a) above shall not be allocated in any part to this commonwealth.

Income of the foregoing classes having thus been allocated, the remainder of the net income as defined in section thirty shall be allocated as follows:

If a foreign business corporation carries on no business outside this commonwealth, the whole of said remainder shall be allocated to this commonwealth.

If a foreign business corporation carries on any business outside this commonwealth, the net income taxable under this chapter shall be determined as provided in section thirty-eight.

Section 42. A foreign corporation carrying on part of its business outside the commonwealth may, in lieu of the allocating method required by the preceding section for determining the amount of business assignable to this commonwealth, refuse to accept such determination by notification thereof to the commissioner on or before the time when its income tax return under this chapter is due to [fol. 69] be filed. Such a foreign corporation shall, within thirty days thereafter, file with the commissioner, under oath of its treasurer, a statement in such detail as the commissioner shall require, showing the amount of its annual net income derived from business carried on within the commonwealth. The commissioner may require such further information with reference thereto as he may deem necessary for the assessment of the tax, and shall determine the proportion of the net income received from business carried on within the commonwealth.

Section 43. After determining the amount of tax due from any foreign corporation under paragraph (2) of section thirty-nine, the commissioner shall then credit the corporation with a sum equal to five per cent of the dividends paid by it, during the previous calendar year, to inhabitants of this commonwealth, and the amount then remaining due shall be the amount of tax to be levied upon the corporation under said paragraph; provided, that if more than one half of the capital stock of any such corporation is owned by another foreign corporation not subject to taxation under sections

thirty to fifty-one, inclusive, but has stockholders who are inhabitants of this commonwealth and are subject to taxation upon their income under section one of chapter sixty-two, such corporation, upon filing with the commissioner such information as he shall deem necessary for the purpose, shall be credited with a sum equal to five per cent of such a proportion of its total dividends as will prevent double taxation of the income of the corporation and of the dividends of such other foreign corporation actually taxed to inhabitants of this commonwealth.

* * * * * * *

[fol. 70] Section 52. If the excise imposed by section thirty-two on domestic business corporations, or that imposed by section thirty-nine on foreign corporations, is declared unconstitutional by a final judgment, order or decree of the United States Supreme Court or the supreme judicial court of the commonwealth, sections thirty to fifty-one, inclusive, shall be null and void, and all laws repealed or made inoperative by chapter three hundred and fifty-five of the General Acts of nineteen hundred and nineteen shall thereupon be revived and continue in full force and effect as if the said chapter had not been enacted. In such case the commissioner and local assessors shall forthwith assess all taxes that have become due under such prior laws, and the time for making any assessment or performing any other duty imposed or privilege granted by such laws shall be extended for a period of six months after the date when they are thus determined to be in force, and the time within which corporations may apply by petition to the Supreme Judicial Court under section seventy-seven for the abatement of the excise imposed by section thirty-two, or of that imposed by section thirty-nine, shall be extended for the same period. If any part, section or sub-division of said sections, thirty to fifty-one, inclusive, other than the provisions in sections thirty-two and thirty-nine imposing an excise, shall be declared unconstitutional, the validity of the remaining parts of said sections thirty to fifty-one, inclusive, shall not be affected thereby.

[fol. 71] St. 1921, c. 361

Section 1. The tax assessed in the year nineteen hundred and twenty-one accordance with the provisions of section thirty-two of chapter sixty-three of the General Laws and tax assessed against any foreign corporation in accordance with the provisions of section thirty-nine of said chapter sixty-three shall be not less than an amount equal to one twentieth of one per cent of the said corporation's gross receipts from business assignable to this commonwealth as defined in clause six of section thirty-eight of said chapter sixty-three.

Section 2. All provisions of chapters fifty-eight and sixty-three of the General Laws relative to assessment, collection, payment, abatement, penalties, distribution and administration shall, so far as pertinent, be applicable to taxes under this act.

St. 1921, c. 493

Section 1. Every corporation subject to the provisions of sections thirty to sixty, inclusive, of chapter sixty-three of the General Laws, shall pay, in addition to all other taxes, an excise tax at the rate of three quarters of one per cent of its net income as herein defined and apportioned to this commonwealth. "Net income" shall mean the net income of said corporations for the period covered by their return of income to the federal government due next prior to April first, nineteen hundred and twenty-one, subject to the provisions of the following sections.

* * * * * * *

Section 5. The proportion of the net income taxable under this act in cases of corporations carrying on business outside of this [fol. 72 & 73] Commonwealth shall be as follows:—In the case of a corporation deriving profits principally from the ownership, sale or rental of real estate, and in case of a corporation deriving profits principally from the sale or use of tangible personal property owned by it, such proportion as the fair cash value of its real estate and tangible personal property in this commonwealth on April first of the current year is to the fair cash value of the entire real estate and tangible personal property owned by it on that date with no deduction on account of any encumbrance thereon.

In the case of a corporation deriving profits principally from the holding or sale of intangible property such proportion as its gross receipts assignable to this commonwealth for the year covered by its return is to its gross receipts for such year within and without the commonwealth.

In case neither of the above methods is applicable, the commissioner of corporations and taxation shall determine, in such manner as he deems equitable, the proportion of the net income received from business carried on within this commonwealth.

The apportionment of net income to this commonwealth as provided in this section shall apply to all corporations, domestic or foreign, which are taxable under this act.

[fol. 74] [File endorsement omitted.]

[fol. 75] Commonwealth of Massachusetts,
Suffolk, ss:

Supreme Judicial Court

In Equity. #35433.

[Title omitted]

Petition for Writ of Error—Filed June 7, 1923

Now comes the Alpha Portland Cement Company and says that on the 22nd day of May 1923 the Supreme Judicial Court within the

County of Suffolk in the Commonwealth of Massachusetts entered final judgement herein in favor of the above named respondent and against the above named petitioner, in which judgment and the proceedings had prior thereto in said cause certain errors were committed to the prejudice of the above named petitioner, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore the undersigned corporation, being the petitioner aforesaid, prays that a writ of error may issue in this behalf out of the Supreme Court of the United States to the end that the errors so complained of may be corrected and the said judgment reversed and that a transcript of the record, proceedings and papers in this suit duly authenticated may be sent to the Supreme Court of the United
[fol. 76] States.

Alpha Portland Cement Company, By Louis H. Porter, F. Carroll Taylor, John G. Palfrey, Its Solicitors.

[fol. 77] [File endorsement omitted.]

[fol. 78] IN SUPREME JUDICIAL COURT

ORDER ALLOWING WRIT OF ERROR

Writ of error allowed upon the execution of a bond by the above named petitioner as principal, and the New Amsterdam Casualty Co. of Maryland, as surety in the sum of Five Hundred Dollars $500.

June 5, 1923.

Arthur P. Rugg, Chief Justice of the Supreme Judicial Court of the Commonwealth of Massachusetts.

[fol. 79] COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

SUPREME JUDICIAL COURT

In Equity. #35433.

[Title omitted]

ASSIGNMENT OF ERRORS—Filed June 7, 1923

Now comes Alpha Portland Cement Company, the petitioner in the above entitled cause, being the plaintiff in error herein, and with its petition for a writ of error makes and files the following assignment of errors, and says that there is manifest error in the records and proceedings in the above entitled case, and for the purpose of having the same reviewed in the Supreme Court of the United States makes the following assignment of errors:

1. The court erred in holding that the provision of the Massachusetts Excise Tax on foreign corporations as contained in Chapter

63 of the General Laws of the Commonwealth of Massachusetts and the acts in amendment thereof and in addition thereto, and Chapter 361 and Chapter 493 of the Massachusetts Acts of 1921, as applied to the plaintiff in error, were constitutional and not in violation of the provisions of the "commerce clause" contained in Section 8, Article I of the Constitution of the United States, as placing a burden or [fol.80] tax on interstate commerce equivalent to the regulation thereof; and

II. The court erred in holding that the provisions of the said Massachusetts Excise Tax on foreign corporations as contained in Chapter 63 of the General Laws of the commonwealth of Massachusetts and the acts in amendment thereof and in addition thereto, and Chapter 361 and Chapter 493 of the Massachusetts Acts of 1921, as applied to the plaintiff in error are constitutional and not in conflict with and in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, as depriving the petitioner of its property without due process of law, and denying the petitioner the equal protection of law in that said statute imposes a tax on income of the business and sales made outside of the said Commonwealth, and upon property located without said Commonwealth.

For which errors the said plaintiff in error, Alpha Portland Cement Company, prays that the judgment of the said Supreme Judicial Court for the Commonwealth of Massachusetts be reversed and judgment entered for the plaintiff in error, and for costs.

Alpha Portland Cement Company, By Louis H. Porter, F. Carroll Taylor, John G. Palfrey, Its Solicitors

[fol. 81] [File endoresment omitted.]

[fol. 82–84] COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

SUPREME JUDICIAL COURT

IN EQUITY. #—.

[Title omitted.]

BOND ON WRIT OF ERROR [FOR $500.00; APPROVED, RUGG, C. J., AND OMITTED IN PRINTING.]

85 CITATION AND SERVICE

UNITED STATES OF AMERICA, ss:

The President of the United States to Commonwealth of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the City of Washington in the District of Columbia, *thirty days after date of this action, pur-

*Not exceeding 30 days from the day of signing.

suant to a Writ of Error filed in the Clerk's Office of the †Supreme Judicial Court of the Commonwealth of Massachusetts within and for the County of Suffolk, wherein Alpha Portland Cement Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Arthur P. Rugg, Chief Justice of the Supreme Judicial Court of Massachusetts this fifth day of June, in the year of our Lord one thousand nine hundred and twenty-three. Arthur P. Rugg, Chief Justice of the Supreme Judicial Court of the Commonwealth of Massachusetts.

[fol. 86] UNITED STATES OF AMERICA,
District of Massachusetts, ss:

Boston, June 5, 1923.

Due and sufficient service of the within citation is hereby accepted in behalf of the Commonwealth of Massachusetts.

Alexander Lincoln, Assistant Attorney General.

[fol. 87] COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

SUPREME JUDICIAL COURT

CLERK'S CERTIFICATE

I, John F. Cronin, Clerk of the Supreme Judicial Court within and for the County of Suffolk and Commonwealth of Massachusetts, do hereby certify that the papers hereunto annexed are an exemplification of the record in the case of Alpha Portland Cement Company, Petitioner, vs. Commonwealth of Massachusetts, Respondent, in said Supreme Judicial Court determined; and attached thereto, and transmitted with said record, are a copy of the Opinion of the Supreme Judicial Court for the Commonwealth, attested by the Reporter of Decisions; a copy of the Application for Writ of Error; a copy of the Assignment of Error; a copy of the Bond; and the original Citation with acceptance of service endorsed thereon.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Boston this twelfth day of June in the year of our Lord one thousand nine hundred and twenty-three.

John F. Cronin, Clerk. [SEAL.]

Endorsement on cover: File No. 29,712. Massachusetts Supreme Judicial Court. Term No. 402. Alpha Portland Cement Company, plaintiff in error, vs. Commonwealth of Massachusetts. Filed June 29th, 1923. File No. 29,712.

†Name of Court to which Writ of Error is directed.